TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~101~~. 644

THE PEOPLE OF THE STATE OF NEW YORK EX REL. EDWARD ANNAN, PLAINTIFF IN ERROR,

vs.

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JANUARY 21, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1104.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. EDWARD ANNAN, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a In obedience to the writ of error annexed hereto, issued by the Supreme Court of the United States on the 9th day of December, 1889, the annexed transcript of the record of this court, with copies of all the papers and proceedings in the above suit filed and remaining of record in this court, are hereby certified and sent to the said Supreme Court of the United States, as in said writ directed.

Seal Kings County. Given under my hand and seal this 14th day of January, 1890.

WM. J. KAISER, *Clerk.*

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said supreme court, before you or some of you, said judgment having been affirmed by the court of appeals of the State of New York, being the highest court of the State of New York in which a decision could be had in the said suits between the People of the State of New York at the relation of Edward Annan and Andrew Walsh, police justice of the city of Brooklyn, and between the People of the State of New York at the relation of Edward Annan and Clark D. Rhinehart, sheriff of the county of Kings, and the record having been remitted from said court of appeals to your court, wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute or an authority exercised under said State on the grounds of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, a

c manifest error hath happened, to the great damage of the said Edward Annan, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid on this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and ninety, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Su-

preme Court, the fifth day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

The foregoing writ is hereby allowed.
Dec. 5, 1889.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 40, 464. Supreme Court of the United States. The People of the State of New York *ex. rel.* Edward Annan, plaintiff in error, against Andrew Walsh, police justice of the city of Brooklyn, and Clark D. Rhinehart, sheriff of the county of Kings, defendants in error. Writ of error. Bergen & Dykman, attorneys for plaintiff in error, 189 Montague street, Brooklyn, N. Y. To ——, Esq., attorney for —. Filed Dec. 9, 1889. F.

d Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 15th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before the judges of said court.

Witness the Hon. William C. Ruger, chief justice, presiding.
GORHAM PARKS, *Clerk.*

Remittitur, October 15th, 1889.

e In the Matter of the Application of EDWARD ANNAN for a Writ of *Habeas Corpus* and a Writ of Certiorari to Inquire into the Cause of His Imprisonment.

Be it remembered that on the 23rd day of October, in the year of our Lord one thousand eight hundred and eighty-eight, Edward Annan, the appellant in this action, came here into the court of appeals, by Bergen & Dykman, Esqrs., attorney-, and filed in the said court a notice of appeal and return thereto from an order of the general term of the supreme court of the State of New York; and Clark D. Rhinehart, as sheriff, and Andrew Walsh, as police justice, &c., the respondent- in said action, afterwards appeared in said court of appeals by Hon. James W. Ridgway, district attorney.

f Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. William N. Dykman, of counsel for the appellant, and by Mr. J. A. Hyland, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order

of the general term of the supreme court appealed from to this court be, and the same is hereby, affirmed.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

g Therefore it is considered that the said order be affirmed as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *Oct. 15th*, 1889.

I hereby certify that the preceding record contains a [L. S.] correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

GORHAM PARKS, *Clerk.*

h Court of Appeals of the State of New York.

THE PEOPLE *ex Rel.* EDWARD ANNAN, Appellant,
against
ANDREW WALSH, Police Justice of the City of Brooklyn, Respondent.

THE PEOPLE *ex Rel.* EDWARD ANNAN, Appellant,
against
CLARK D. RHINEHART, Sheriff of the County of Kings, Respondent.

Appeal Book.

Bergen & Dykman, attorneys for appellants, 189 Montague St., Brooklyn, N. Y.; Hyland & Zabriskie, attorneys for respondents, 45 Broadway, New York.

1 Supreme Court.

In the Matter of the Application of EDWARD ANNAN for a Writ of *Habeas Corpus.*

This matter was brought before the supreme court at general term, in the second department, in the first instance, by writs of *habeas corpus* and certiorari, to inquire into the detention of Edward Annan,

who was arrested and imprisoned for a violation of chapter 581 of the laws of 1888, forbidding the charge of more than specified rates for elevating grain.

The writs were dismissed by the general term and the prisoner remanded on October 1, 1888.

There has been no change of parties.

BERGEN & DYKMAN,
Attorneys for Relator-Appel-ant.

2 "A."

The people of the State of New York to the sheriff of Kings county, Greeting:

[SEAL.]

Hab. corpus to bring up person.

We command you that you have the body of Edward Annan, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Edward Annan is called or charged, before our supreme court, at a general term to be held in the court-house, in the city of Poughkeepsie, on the 25th day of June, eighteen hundred and eighty-eight, at eleven o'clock in the forenoon, to do and receive what shall then and there be considered concerning Edward Annan; and have you then there this writ.

Witness Hon. C. E. Pratt, one of the justices of our supreme court, the 22d day of June, one thousand eight hundred and eighty-eight.

JOHN M. RANKEN, *Clerk.*

BERGEN & DYKMAN, *Attorneys.*

3 *Writ of Habeas Corpus.*

Supreme Court.

In the Matter of the Application of EDWARD ANNAN for a Writ of *Habeas Corpus.*

BERGEN & DYKMAN,
Relator's Attorneys.

Allowed this 22d day of June, 1888, on application of Edward Annan.

Notice to the district attorney of Kings county served on or before the 23d day of June, 1888, shall be sufficient.

C. E. PRATT, *J. S. C.*

To the supreme court of the State of New York:

The petition of Edward Annan respectfully shows:

I. That he is now imprisoned or restrained in his liberty by the sheriff of Kings county, having been thereunto committed by Hon. Andrew Walsh, police justice of the city of Brooklyn.

II. That your petitioner was not committed and is not de-
4 tained by virtue of a mandate issued by a court or a judge of the United States in a case where such courts or judges have

exclusive jurisdiction under the laws of the United States or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; and your petitioner further shows that he was not committed and is not detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt, or by virtue of an execution or other process issued upon such judgment, decree, or final order.

III. Your petitioner further shows that the cause or pretence of his imprisonment and restraint, according to the best knowledge and belief of your petitioner, is that he is charged with having committed a misdemeanor by violating and offending against the provisions of an act of the Legislature of the State of New York entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State," passed June 9, 1888, being chapter 581 of the laws of 1888, and that his offence is that he has charged more than five-eighths of one cent a bushel for elevating, receiving, weighing, and discharging grain, and has charged against a canal boat or ocean steamer more than the actual cost of trimming or shoveling grain to the leg of the elevator.

IV. Your petitioner further shows that he is advised by his counsel, William N. Dykman, Esq., residing at 171 Cumberland street,
in the city of Brooklyn, and verily believes, that his impris-
5 onment and restraint is illegal, and that such illegality consists in this, that the said act is unconstitutional and void, being in contravention of the constitution of the State of New York and in contravention of the Constitution of the United States.

Wherefore your petitioner prays a writ of *habeas corpus* to inquire into the cause of such imprisonment.

EDWARD ANNAN.

COUNTY OF KINGS, *ss:*

Edward Annan, being duly sworn, says that he has heard read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

EDWARD ANNAN.

Sworn to before me this 22d day of June, 1888.

A. F. BRITTON,
Notary Public, Kings County.

6 The people of the State of New York to Andrew Walsh, police justice of the city of Brooklyn, Greeting:

We command you that you certify fully and at large to our su-

[SEAL.] preme court and to the justices of our supreme court, at a general term thereof, to be held at the court-house, in the city of Poughkeepsie, on the 25th day of June, 1888, at 11 o'clock in the forenoon, the day and cause of the imprisonment of Edward Annan, by you detained, as is said, by whatsoever name the said Edward Annan shall be called or charged; and have you then this writ.

Certiorari to certify cause of detention.

Witness Hon. C. E. Pratt, one of the justices of our supreme court, this 22d day of June, 1888.

BERGEN & DYKMAN, *Attorneys.*

JOHN M. RANKEN, *Clerk.*

7 *Writ of Certiorari.*

Supreme Court.

In the Matter of the Application of EDWARD ANNAN for a Writ of Certiorari.

BERGEN & DYKMAN,
Relator's Attorneys.

Allowed this 22d day of June, 1888, on application of Edward Annan.

Notice to the district attorney of Kings county served on or before the 23d day of June, 1888, shall be sufficient.

C. E. PRATT, *J. S. C.*

To the supreme court of the State of New York:

The petition of Edward Annan respectfully shows:

I. That he is now imprisoned or restrained in his liberty by the sheriff of Kings county, having been thereunto committed by Hon. Andrew Walsh, police justice of the city of Brooklyn.

II. That your petitioner is not committed and is not detained by virtue of a mandate issued by a court or a judge of the United States in a case where such courts or judges have exclusive jurisdiction under the laws of the United States or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; and your petitioner further shows that he was not committed and is not detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt, or by virtue of an execution or other process issued upon such judgment, decree, or final order.

8

III. Your petitioner further shows that the cause or pretense of his imprisonment and restraint, according to the best knowledge and belief of your petitioner, is that he is charged with having committed a misdemeanor by violating and offending against the provisions of an act of the Legislature of the State of New York entitled

"An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State," passed June 9, 1888, being chapter 581 of the laws of 1888, and that his offence is that he has charged more than five-eighths of one cent a bushel for elevating, receiving, weighing, and discharging grain, and has charged against a canal boat or ocean steamer more than the actual cost of trimming or shoveling grain to the leg of the elevator.

IV. Your petitioner further shows that he is advised by his counsel, William N. Dykman, Esq., residing at 171 Cumberland street, in the city of Brooklyn, and verily believes, that his imprisonment and restraint is illegal, and that such illegality consists in this, that the said act is unconstitutional and void, being in con-
9 travention of the constitution of the State of New York and in contravention of the Constitution of the United States.

Wherefore your petitioner prays a writ of certiorari to inquire into the cause of such imprisonment.

EDWARD ANNAN.

COUNTY OF KINGS, *ss:*

Edward Annan, being duly sworn, says that he has heard read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

EDWARD ANNAN.

Sworn to before me this 22d day of June, 1888.

A. F. BRITTON,
Notary Public, Kings County.

The undersigned, sheriff of the county of Kings, respectfully returns and says that he received the annexed paper marked "A" on the 22d day of June, 1888, at 2 o'clock and 20 minutes p. m., at which time there was in his custody the body of Edward Annan, who he believes to be the person named in said paper marked "A" and who was so there in his custody as being the person named in the original paper, of which the annexed paper marked "B" is a copy, and the original whereof I now produce.

10 And so returning the undersigned produces the body of said person in obedience to the command expressed in paper "A."

Brooklyn, June 22d, 1888.

CLARK D. RHINEHART, *Sheriff.*

The paper referred to in the above return marked "A" is the writ of *habeas corpus* and the paper marked "B" is the commitment.

To the supreme court:

In obedience to the writ of certiorari hereunto annexed I certify and return that on the 22d day of June, 1888, one John R. Taylor

made complaint to the undersigned against Edward Annan for a violation of chapter 581 of the laws of 1888. A copy of the information or affidavit is hereunto annexed, marked "A."

The defendant, Edward Annan, was in court on that day with his counsel. An examination of the witnesses was reduced to writing and is hereunto annexed, marked "C."

I held the defendant, Edward Annan, for trial and committed him to the custody of the sheriff of Kings county, and a copy of the commitment is hereunto annexed, marked "B."

All of which is respectfully submitted.

Dated Brooklyn, June 23, 1888.

ANDREW WALSH,
Police Justice.

11 "A."

Before Andrew Walsh, police justice, city-hall district.

THE PEOPLE OF THE STATE OF NEW YORK
against
EDWARD ANNAN.

Defendant arraigned June 22, 1888.

The charge specified in the information and the depositions taken thereon were distinctly read to defendant. He was informed of the same and of his right to the aid of counsel in every stage of the proceeding, and a reasonable time was allowed him to send for and advise with counsel.

STATE OF NEW YORK, *County of Kings*, } *ss.:*

John R. Taylor, being duly sworn, deposes and says that he resides in the city of New York; that on the 21st day of June, 1888, in the city of Brooklyn and State of New York, one Edward Annan, who, as deponent is informed and believes, resides at 201 Washington Park, in the city of Brooklyn, did wilfully and unlawfully violate the provisions of chapter 581 of the laws of 1888 relating to the charges for elevating, receiving, weighing, and discharging grain, in that he did, on said 21st day of June, 1888, at the
12 city of Brooklyn, charge and exact from this deponent more than five-eighths of one cent per bushel for elevating, weighing, receiving, and discharging a boat-load of grain from the canal boat A. B. Twombly to the ocean steamer Olinda, and that he did charge and exact from the canal boat and its owner more than the actual cost of trimming or shoveling to the leg of the elevator, and that he did charge against the ocean steamer more than the actual cost of trimming the cargo.

The elevating, receiving, weighing, and discharging grain aforesaid from the canal boat A. B. Twombly to the ocean steamer Olinda was done by the floating elevator Ceres, of which said Edward Annan is a part owner and one of the agents.

JOHN R. TAYLOR.

Subscribed and sworn to before me this 22d day of June, 1888.

ANDREW WALSH,
Police Justice.

STATE OF NEW YORK, }
County of Kings, } *ss:*

In the name of the people of the State of New York, to any policeman of the city of Brooklyn:

Information upon oath having been this day laid before me that the crime of misdemeanor has been committed on the 21st day of June, 1888, and accusing Edward Annan thereof:

13 You are therefore commanded forthwith to arrest the above-named Annan and bring him before me, at my court-room, 318 to 322 Adams street, in said city of Brooklyn, or, in case of my absence or inability to act, before the nearest or most accessible magistrate in said city.

Dated at the city of Brooklyn this 22d day of June, 1888.

ANDREW WALSH,
Police Justice of the City of Brooklyn.

"C."

Before Andrew Walsh, police justice, city-hall district.

THE PEOPLE OF THE STATE OF NEW YORK }
against
EDWARD ANNAN. }

FRIDAY, *June* 22, 1888.

JOHN R. TAYLOR, called on behalf of prosecution, and being further cross-examined, testified as follows:

By Mr. DYKMAN:

Q. You are the agent of the canal boat A. B. Twombly?

A. Yes, sir.

14 Q. Is that the boat which was unloaded by the floating elevator Ceres?

A. It was.

Q. And it was for that elevating, receiving, weighing, and discharging that you say Mr. Annan charged more than five-eighths of a cent a bushel?

A. I do say so, and I made a protest at the time.

Q. Where did the A. B. Twombly come from?

A. Came from Buffalo; and as near as I can tell you the grain came from the Northwest.

Q. From Duluth?

A. From Duluth.

Q. How would you describe the cargo of wheat?

A. No. 1, hard.

Q. And that comes from Duluth, does it not?

A. That comes from Duluth and other points adjacent.

Q. Where was the A. B. Twombly and her cargo on the *the* 9th June?

A. She was on a voyage from Buffalo here.

Q. On the canal?

A. Yes, sir.

Q. Have you got her bill of lading?

A. I have not got the bill of lading with me; no; but all canal-boat bills of lading are uniform.

Q. (Handing paper to witness.) Was her bill of lading, the printed part, like the one I show you?

A. The printed part was exactly like that; they are all uniform; no variation.

Q. Then, with the exception of the writing on this bill of lading, which was filled in to suit the consignee, the name of the canal boat and the cargo, the bill of lading of the A. B. Twombly was like this?

A. All the same as this.

The paper referred to is offered in evidence, received, and
15 marked "Exhibit No. 1, June 22, 1888."

Q. Have you any idea how much grain was afloat in canal boats on the 9th of June?

A. Well, I should say anywhere from 150 to 200 boat-loads.

Q. That would make between one and two millions?

A. Yes, sir; between one and a half and two, I should judge.

Q. On bills of lading like this?

A. Yes; all grain is shipped on similar bills.

Q. Do you know how many different firms are operating floating elevators in the port of New York?

A. I could enumerate a few, but I couldn't give you exactly how many.

Q. How many would you say?

A. I could say five, anyway.

Q. And some that you can't think of?

A. Some that I can't think of. I might go to the different stations around and enumerate a good many, but there are five, anyway.

Q. What was the old schedule of prices for this elevating and receiving?

A. A canal-boat elevation was one-half of one cent a bushel, and then came the other charges incident to blowing and screening and so on, that went to the vessel; the part the canal boat paid was one-half a cent a bushel.

Q. What is the customary way for a canal boat to deliver its cargo under the bill of lading?

A. By going where she was ordered to, and they furnishing an elevator; it might be a load of something to go to some out-of-the-way place, but take ordinary grain and it all goes out by the elevator, and the charge to the canal boat is one-half a cent a bushel.

16 Q. The other charges are against the ocean steamer?

A. Yes, sir.

Q. It is true, is it not, that all the business of the floating elevators is transferring grain from the canal boat to ocean steamers?
A. Yes, sir; that is so.
Q. Do you know the steamer into which this grain was elevated by the Ceres from the Twombly?
A. I saw it yesterday.
Q. What was it?
A. The Olinda.
Q. And what was her port of destination?
A. That I couldn't say.
Q. Do you know what country she was from?
A. No; I do not.

Prosecution rests.

EDWARD ANNAN, called on behalf of defence, being duly sworn, testified as follows:

Examined by Mr. DYKMAN:

Q. You are one of the owners of the Ceres?
A. Yes, sir.
Q. Who are the other owners? Are they all private parties?
A. All private parties.
Q. Individuals?
A. Individuals.
Q. No corporation or company has any interest in the Ceres, has it?
A. No, sir.
Q. What is your ownership in the Ceres?
A. I think it is $\frac{3}{48}$.
Q. Who are the agents of the Ceres?
A. Annan & Co.
17 Q. Annan & Co. is a copartnership firm?
A. Yes, sir.
Q. Composed of whom?
A. Edward Annan, John B. McCue, and E. G. Burgess.
Q. Have you any competitors in that business, Mr. Annan?
A. Yes, sir.
Q. How many?
A. Several.
Q. In floaters?
A. In the floaters.
Q. Are your competitors with the warehouses along shore?
A. Yes, sir.
Q. Will you describe the work which a floating elevator does?
A. It takes the grain from the canal boat, elevates it, weighs it, and delivers it to the ship.
Q. The floating elevator is a boat, is it not?
A. Yes, sir.
Q. Ordinarily a steam-propeller?
A. We have both steam-propellers and scows.

Q. And do they have towers above deck?
A. Yes, sir.
Q. Which have a machinery for elevating grain?
A. Yes, sir.
Q. And weighing it and discharging it?
A. Yes, sir.
Q. What machinery have the shore warehouses to do the same work?
A. They have the towers; they have the same machinery practically.
Q. The same machinery?
A. The same machinery.
18 Q. How much competition has there been in this business, say, for the last two years?
A. It has been fierce all the way through.
Q. Can you describe it in its effect on the profits?
A. Yes, sir.
Q. Do so.
A. The floating elevators have not been able to earn a dividend for nearly two years.
Q. Are you a member of the produce exchange?
A. Yes, sir.
Q. (Handing book to witness.) Do you recognize the book I show you?
A. Yes, sir.
Q. The Produce Exchange Annual Report, 1885–'6?
A. Yes, sir; I do.

Mr. Dykman offers in evidence that part of page 103 which shows that there are six firms operating thirty-one floating elevators, and that — twenty-two stationary warehouses for grain. It is admitted.

Q. Will you describe how the schedule of prices contained in this produce-exchange book for elevating, weighing, receiving, and discharging grain was made up—between whom?
A. Between the receiver and the buyer and the agent of the ship and canal boat.
Q. You misunderstand me. There was a schedule of charges?
A. That was made up by the produce exchange.
Q. Is there a part of the members of the produce exchange generally known as the grain trade?
A. Yes, sir.
Q. And has that trade a committee?
19 A. Yes, sir.
Q. Who were those members of the produce exchange called the grain trade?
A. They are members that deal almost exclusively in grain.
Q. And they are the members concerned in the price for handling grain?
A. They are.
Q. Who was it that made the agreement with the floating-elevator men and the shore warehousemen for the schedule of prices?

A. These rules were gotten up by the grain committee and submitted to the members of the produce exchange to vote on.

Q. What control has the produce exchange over the shore warehouses?

A. They give them a license.

Q. And what about the warehouse receipts?

A. The warehouse receipts are considered regular.

Q. Are those warehouse receipts the medium for transacting grain business on the produce exchange?

A. Yes, sir.

Mr. Dykman offers in evidence rule 5, section 1, of the rules of the grain trade established by the New York Produce Exchange, to the effect that no warehouse receipt can pass current on the floor unless the warehouse is licensed by the exchange.

He offers the charter of the produce exchange showing the right to make such by-laws.

Also all of the rules of the grain trade and the schedule of prices, being part of that, and a list of the stationary and floating warehouses.

They are all admitted.

20 Q. Has there been a meeting of the grain trade or of a committee of the grain trade with the warehouse and floating-elevator men or a committee of them since the passage of the bill?

A. Yes, sir.

Q. What was the result of that?

A. The result was that they revised the prices to get around this bill; they made the weighing and elevation five-eighths of a cent.

Q. And what other changes did they make?

A. $1.50 per thousand for trimming for canal boats.

Q. And $2.00 for trimming ocean vessels?

A. Yes, sir.

Q. And in the case of floating elevators was there a new charge made?

A. Yes, sir.

Q. A change never before made?

A. Yes, sir.

Q. And what was that for?

A. Transportation.

Q. And what was that?

A. One-half cent a bushel.

Q. Now, all the grain handled by the floating elevators, or substantially all of it—where does it come from?

A. From the canal and from the railroad.

Q. By canal and by railroad from where?

A. From Buffalo.

Q. From the Western States?

A. The canal comes from Buffalo and the railroad comes from all parts of the Western States.

Q. But the grain is grown and shipped from the West?

—. ——.

Q. And where does the bulk of it go?
A. It goes to Europe.
Q. Where is the Olinda?
21 A. It is lying at Dow's stores.
Q. And where is she going?
A. I think she is going to Spain.
Q. Did you get a letter from Capt. Dupuy a short time ago?
A. I did.
Q. Who is Capt. Dupuy?
A. He is captain of one of the canal boats.
Q. Is he prominent in the canal-boat association?
A. Yes, sir.

The letter referred to and the envelope containing it are offered and received in evidence.

Q. (Handing paper to witness.) Is that an account of that meeting of that committee of the grain trade and the committee of the floating and stationary elevator men?
A. Yes, sir.

The paper referred to is offered in evidence, received, and marked Exhibit "No. 2, June 22, 1888."

22 Before Andrew Walsh, police justice, city-hall district.

THE PEOPLE OF THE STATE OF NEW YORK
against
FRANCIS E. PINTO. } June 22, 1888.

FRANCIS E. PINTO, called as a witness and sworn on his own behalf, testified as follows:

Examined by Mr. DYKMAN:

Q. What is your business?
A. Warehouseman.
Q. And your copartnership firm is what?
A. F. E. Pinto and Sons?
Q. And who are your copartners—what are the names of your sons?
A. Francis E., Jr., and William A.
Q. That is a copartnership firm?
A. Yes, sir.
Q. No corporation or company has any interest in your business?
A. None whatever.
Q. Where is your store?
A. Atlantic dock, Atlantic basin, Brooklyn.
Q. You are a lessee of the Pinto stores, are you?
A. Yes, sir.
Q. Your firm is?
A. Yes; a part of them, and some I own.

Q. You own some and lease some?

23 A. Yes.

Q. You or your firm?

A. The firm.

Q. How is the competition carried on by the warehouses on shore?

A. By giving a term of free storage, varying from 30 to 120 days.

Q. How is the competition carried on between the floating elevators.

A. By giving a cash rebate to the customer.

"EXHIBIT I."

No. —. BUFFALO, —— —, 188–.

Shipped by —— ——, as agent, in apparent good order, on board the canal boat ——, of ——, whereof —— —— is master, the following-described property, to be transported to the place of destination without unnecessary delay and to be delivered as addressed in the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill; consignees to pay all harbor towing from and to the usual place of landing; three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of 2½ per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified until the cargo is fully discharged; and it is agreed between the carriers and

24 shippers and assigns that, in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to the quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named; all damages caused by the boat or carrier or deficiency in the cargo from quantity as hereon specified to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignees. In case the grain becomes heated while in transit the carrier shall deliver his entire cargo, and pay only for any deficiency caused by heating, exceeding five bushels for each one thousand bushels; and it is further agreed, in case this cargo is frozen while in transit, the owner of the boat is to pay interest and exchange on the advances and charges advanced by *be* me on this cargo, the same to be deducted from balance of freight on delivery.

The freight, charges, and demurrage payable to —— ——, by check, to the order of the National Bank of Commerce, in New York, to the amount of $——, balance —— to order, at place of destination, who is agent for captain or owner and the only party authorized to

collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

----Bushels----------
Freight to New York — cts. per bush.----------
Advance charges----------
Our advances to Capt.----------
25 Total----------
Less collection----------
Subject to our draft----------
On safe delivery pay captain----------balance----
Care----------
----Agents----------
New York----------
Insured in the----------

"Exhibit" No. 1, June 22, E. T. P.

EXHIBIT No. 2.

Notice.

A meeting of the members of the grain trade will be held in the call-room on Monday, June 18th, 1888, immediately after the grain call, to receive and act upon the following report of the special committee of grain receivers, exporters, and steamship agents in conference with the committee of elevator and warehouse men.

By order—

CHARLES C. BURKE,
Vice-President.

June 15, 1888.

Report.

NEW YORK, *June* 15, 1888.

To the members of the grain trade.

GENTLEMEN: The following proposition as to the charges on grain was considered and accepted by the joint committee of grain receivers, exporters, and steamship agents at a conference held
26 June 14th, 1888, with the elevator and warehouse men, and is recommended to the trade for adoption, viz:

Charges—Grain Afloat.

Receiving, weighing, and discharging ($\frac{5}{8}$c.) per 1,000	$6 25
Canal-boat trimming per 1,000	1 50
Trimming (ocean vessels) per 1,000	2 00
Transportation of elevator ($\frac{1}{2}$c. per bushel) per 1,000	5 00
Total charge (per 1,000)	$14 75

Charges—Grain in Store.

Receiving, weighing, and discharging, including ten days' storage, (⅝c. per bu.) per 1,000	6 25
Canal-boat trimming per 1,000	1 50
Trimming (ocean vessels) per 1,000	2 00
Extra storage (½c. per bushel) per 1,000	5 00
Total charges (per 1,000)	$14 75

To carry into effect the above proposition the grain rules should be amended as follows:

Amend rule 26 of the grain rules by striking out the first sentence thereof and inserting the following:

"On all deliveries of grain, afloat or in store, buyers shall incur one-half of the customary expenses of receiving, weighing, and discharging (⅝c. per bushel). On all deliveries of grain from
27 store into ocean-bound vessels an extra charge of storage of one-half cent per bushel shall be incurred. On sales of grain afloat to be delivered into ocean-bound vessels buyers shall pay one-half cent per bushel transportation of elevator, which shall be collected by seller."

HENRY T. KNEELAND, *Chairman*,
DAVID BINGHAM,
F. W. J. HURST,
FRANKLIN QUINBY,
HENRY L. WARDWELL,
FREDERICK WEBER,
FRED. V. DARE,
} *Special Committee.*

Exhibit No. 2.

Floating and Stationary Elevators at the Port of New York.

Stationary.

Name of owners or managers.	Names of elevators.	Location.	Storage capacity.	Transfer capacity per hour.
			Bushels.	
New York Central & Hudson R. R. elevator, Charles A. Pool & Co., lessees, 1 & 3 Beaver St.	N. Y. Central and H. R. R. R.	Foot 60th St., N. R., N. Y. city	2,300,000	60,000
Erie elevator, Annan & Hoyt, managers, 102 Produce Exchange.	Erie elevator	Jersey City, N. J.	1,500,000	50,000
Pennsylvania R. R. elevator, 8 Broadway	Pennsylvania R. R.	Jersey City, N. J.	1,500,000	50,000
The Grain Warehousing Co., Atlantic dock, Brooklyn; office 207 Produce Exchange, N. Y., R. H. Laimbeer, pres. and treas.	Stores Nos. 2 to 16, inclusive	Com'l wharf, Atlantic dock, B'klyn	6,000,000	25,000
	Stores Nos. 51 to 59, inclusive	" " " " "		
	Stores Nos. 6 to 11, inclusive	Clinton " " " "		
	Stores Nos. 70 to 92, inclusive	South pier " " "		
E. Annan, 103 Produce Exchange	Columbia stores	Foot Atlantic St., Brooklyn	1,500,000	8,000
Trustees estate of Wm. Beard, 16 Beaver St.	Dows' stores	Foot Pacific St., Brooklyn	2,500,000	24,000
F. Woodruff & Co., 202 Produce Exchange	Beard's	Erie basin, Brooklyn	2,750,000	10,000
Nash, Whiton & Co.	F. Woodruff & Co.'s	Foot Joralemon St., Brooklyn	1,500,000	8,000
F. E. Pinto & Sons, 459 Produce Exchange	Commercial stores	Com'l stores, Atlantic dock	2,000,000	5,000
U. S. Warehouse Co., J. E. Whilbey, sec'y, foot Degraw St., Brooklyn.	Francis E. Pinto's	Atlantic dock, Brooklyn	1,500,000	10,000
	U. S. Warehouse Co.	Foot Degraw St.	500,000	14,000
E. B. Bartlett & Co., 19 Old Slip	Kelsey's stores	Foot Irving St., Brooklyn	1,000,000	8,000
India Wharf Storage Co.	Central	150 to 162 Furman St., Brooklyn	1,000,000	16,000
S. W. Bowne	India wharf stores	60 Hamilton Av., Brooklyn	600,000	6,000
S. W. Tripp & Co., foot W. 34th St.	Bowne's stores	Gowanus canal "	600,000	3,000
W. H. Payne, foot E. 129th St.	Tripp's	Foot W. 34th St., N. Y. city	300,000	4,000
E. M. Van Tassel, pier 39, N. R.	Payne's	" E. 129th St., "	100,000	2,500
J. A. Beyer & Co., foot Taylor St., Brooklyn, E. D.	Van Tassel's	" of Vestry St., "	30,000	2,500
	Beyer's	" Taylor St., Brooklyn, E. D.	150,000	6,500
Neidlinger, Schmidt & Co., foot E. 63d St.	Neidlinger, Schmidt & Co.'s	" E. 63d St., N. Y. city	475,000	3,500

T. B. Tweddle, foot E. 48th St.	Tweddle's	" E. 48th St., "	125,000	1,000
Clark & Allen, foot E. 23d St.	Clark & Allen's	" E. 23d St., "	30,000	2,000
Shaw, Truesdell, 2d St. and Gowanus canal, Brooklyn.	Shaw & Truesdell's	2d St. and Gowanus canal, B'klyn	100,000	2,000

Floating.

International Grain Elevating Association, Annan & Co., 101 Produce Exchange, N. Y. city.	Josie Mildred, 8,000 bushels		8,000
	N. Y. Republic, Ceres, Antwerp, each (2 hgs.) 8,000 bushels		32,000
	Bolivia, Reservator, Egypt, Fairfield, each 5,000 bushels		20,000
	Continental Eldredge, International, Manhattan, Metropolitan, Russia, Somerset, America, Excelsior, London, Malster, Croton, each 4,000 bushels		48,000
The N. Y. Floating Elevator Association, Geo. D. Puffer, agent, 319 Produce Exchange, New York.	Albany, Havre, Hudson, Liverpool, Oswego, each 5,000 bushels		25,000
Knapp & McCord, 94 Broad St.	Telegraph and J. L. Bower, each 4,000 bushels		8,000
Mongann & Bonnell, station, pier 6, North River.	Hillyer		3,000
Marsh, White & Co., foot Quay street, Brooklyn.	Manhattan		5,000
S. McConnell, 12 Bridge street	Geo. Albert		3,500
Totals	22 stationary and 31 floating elevators	28,000,000	474,000

EXHIBIT 3.

Envelope postmarked Fultonville, N. Y., June 14, and directed to—

EDWARD ANNAN, Esq.,
N. Y. Produce Exchange,
New York city.

Letter:

Edward Annan, Esq., New York.

DEAR SIR: The first prescription prepared for the elevator owners by the Legislature is a sweet morsel compared with the dose in store for them. You, as leader of the elevator combination, would exhibit good sense by complying with the McEvoy bill.

Yours respectfully, CAPT. M. DEPUY.

Fultonville, June 14, '88.

28 *Warehouses.*

Rule 5.

SECTION 1. The board of managers may designate warehouses whose receipts shall be regular upon the written application of the owners or lessees (who must be members of the exchange), endorsed by not less than five members of the grain trade.

The application shall set forth the location and name of such warehouse, depth of water, capacity, quantity of grain that can be received and delivered per hour, number of elevators, and facilities for clearing grain.

The board of managers may reconsider and withdraw their approval of any designated warehouse for cause upon a summary proceeding before the board on a complaint of any person in writing, setting forth the particular violation of the rules of the grain trade, and upon satisfactory proof, to be taken in such manner as may be directed by the board of managers, and thereupon the receipts of such warehouse shall cease to be a valid delivery on contracts.

SEC. II. Regular warehouses shall embrace only those in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels is not accurately preserved, but two or more warehouses, contiguous, owned or operated by one individual or firm, in which graded grain is stored shall constitute what shall be known as a "system," and warehouse receipts designating the warehouses comprised in such system may
29 be issued without designating the particular warehouse in which the grain was delivered. Such warehouses shall be conveniently approachable by ocean vessels and shall have customary shipping facilities, including elevator, with proper cleaning apparatus.

It shall be the duty of the warehouseman, whose receipts are made regular, to allow the inspector-in-chief to inspect and grade all grain intended to be graded while going into store and on de-

livery from store; but the warehouseman, if not satisfied with the inspection, may refuse to receive the grain, and may, in all cases of dispute on the inspection, appeal to the committee on grain. Such grain may be stored with grain of a similar grade received at the same time as near as may be without regard to ownership. In no case shall grain (other than identical parcels) of different grades be mixed together while in store, nor shall warehouse receipts for the grain be issued upon parcels not originally inspected into store and merged in the grain.

SEC. III. Upon application of the owner or consignee of grain the warehouseman shall issue to the person entitled thereto a warehouse receipt therefor, subject to the order of the owner or consignee, which receipt shall bear date corresponding with the receipt of grain into store, and shall state upon its face the quantity and inspected grade of the grain, and that the grain mentioned in it has been received into store to be stored with grain of the same grade by inspection, and that it is deliverable upon return of the receipt properly endorsed by the person to whose order it was issued and the payment of charges for storage.

All warehouse receipts for graded grain which shall represent the grain as stored in a system of two or more warehouses shall not be deemed regular unless the following condition is incorporated in the receipt:

"In case of loss or damage by fire, so much of the said grain as shall bear a like proportion to this receipt as the lost or damaged grain of same grade shall bear to all grain of like grade in this system of warehouses at the date of said disaster shall be adjudged lost or damaged, and the obligation to deliver it under this receipt, except as salvage, cancelled."

All warehouse receipts for grain issued from the same warehouse shall be numbered consecutively, and no two receipts bearing the same number shall be issued by the same warehouse during any one year, except in the case of a lost or destroyed receipt, in which case the new receipt shall bear the same date and number as the original, and shall be plainly marked on its face "duplicate." If the grain was received from canal boat or other vessel, the name of such craft shall be stated upon the receipt, with the amount it contained.

SEC. IV. The following shall be the form of regular warehouse receipt for graded grain referred to in section 3:

Regular Warehouse Receipt for Graded Grain.

Regular warehouse receipt for graded grain.

No. ---------- ----------Kind of grain----------
Bushels ----------
Grade----------
----------(Date)----------188–.
Received in---- ---- ---- ------stores ----------
from ---------- ---- ----------
---------- ---- ---------- ---------- ---------- ---------- ---------- bushels
of ---------- ---------- ---------- ---------- ---------- ---------- subject
only to the order hereon of ---- ---- ----------
and the surrender of this receipt and payment of charges.

31 It is hereby agreed by the holders of this receipt that the grain herein named may be stored with other grain of the same quality by inspection, in accordance with the rules and regulations of the New York Produce Exchange; loss by fire or heating at owner's risk.

SEC. V. Upon the delivery of grain from store upon any receipt such receipt shall be plainly marked across its face with the word "cancelled," and shall thereafter be void and shall not again be put in condition, nor shall grain be delivered twice upon the same receipt.

SEC. VI. No warehouse receipt shall be issued except upon the actual delivery of grain into store in the warehouse from which it purports to be issued and which is to be represented by the receipt, nor shall any receipt be issued for a greater quantity of grain than was contained in the lot or parcel stated to have been received, nor shall more than one receipt be issued for the same lot of grain except in cases where receipts for part of a lot are desired, and then the aggregate receipts for a particular lot shall cover that lot and no more.

In cases where a part of the grain represented by the receipt is delivered out of store and the remainder is left a new receipt may be issued for such remainder, but such new receipt shall bear the same date as the original and shall state on its face that it is balance of receipt of the original number, and the receipt upon which a part has been delivered shall be cancelled. In case it be desirable to divide one receipt into two or more or in case it be desirable to consolidate two or more receipts into one and the warehouse-
32 man consents thereto the original receipt or receipts shall be issued, expressing on the face that they are parts of other receipts or a consolidation of other receipts, as the case may be, and the numbers of the original receipts shall also appear on the new ones issued, as explanatory of the charge; but no consolidation of receipts of dates differing more than five days shall be permitted, and all new receipts issued for old ones cancelled, *are* herein provided, shall bear the same dates as those originally issued.

SEC. VII. The warehouseman may use his discretion to dispose of by delivery or shipping in the ordinary and legal manner of delivering that grain of any particular grade which was first received by him or which has been for the longest time in store in such warehouse, and, unless some portion of the grain in his warehouse is out of condition or becoming so, such warehouseman shall deliver grain of the grade that was received by him on all receipts as presented: Provided, that when the standard of grades is changed by the committee on grain all grain received prior to such change shall be delivered on the standard in force at the date of the warehouse receipt.

No warehouseman shall be held liable for damage to grain by heating unless it can be shown that he has not exercised proper care in handling and storing the same.

In case, however, any warehouseman shall discover that any portion of the grain in his warehouse is out of condition or becoming

so he shall immediately give notice to the inspector-in-chief of its actual condition, as near as he can ascertain it, and shall state in such notice the kind and the grade of the grain and the bins in which it is stored.

33 It shall be the duty of the inspector-in-chief, on receiving notice of graded grain in store being out of condition, — of such grain promptly, and if found to be out of condition he shall so report to the warehouseman, who shall cause the same to be posted immediately upon the bulletin of the produce exchange, and he shall also state in such notice the receipts upon which such grain will be delivered, giving the numbers, amounts, and dates of each, which receipts shall be those of the oldest dates and numbers, grain represented by which has not previously been declared or receipted for as out of condition; or if the grain in store has not been receipted for he shall so state, and shall give the name of the party for whom such grain was stored, the date it was received, and the amount of it, and the enumeration of receipts and identification of grain so discredited shall embrace, as near as may be, as great a quantity of grain as is contained in such bins; and such grain shall be delivered upon the return and cancellation of the receipts and the unreceipted grain upon the request of the owner or person in charge thereof, and thereafter the receipts so posted shall cease to be a valid delivery of graded grain under these rules between sellers and buyers.

Nothing herein contained shall be held to relieve the said warehouseman from exercising proper care and vigilance in preserving such grain after such publication of its condition, but such grain shall be kept separate and apart from all direct contact with other grain while in store in such warehouse.

In case the grain declared out of condition, as herein provided for, shall not be removed from store by the owner thereof
34 within two days from the date of the notice of its being out of condition, the warehouseman may charge an increased rate of storage on the same by giving public notice on the bulletin of the exchange.

In case of loss or damage by fire the warehouse receipts of the warehouses of elevator wherein the disaster occurs shall cease to be valid delivery of graded grain, under these rules, between sellers and buyers. But where the loss or damage sustained occurs to one or more warehouses comprised in a system, as described in sec. II of this rule, the warehouseman owning or operating such system of warehouses shall at once give public notice on the bulletin of the produce exchange of such fact, and shall also state in such notice the quantity of the various grades of graded grain which was contained in the warehouse or warehouses wherein the loss or damage by fire occurred.

The warehouseman shall also state in such notice the receipts outstanding upon such system of warehouses which are affected by such disaster, and shall call in said receipts for cancellation under the condition of section III of this rule governing cases of loss or damage by fire and for immediate reissue, as provided in section IV of

this rule, for the quantity of grain not injured, and the receipts so reissued, if properly registered, shall be a good tender, as provided in rule 6.

Nothing in this rule shall be so construed as to permit any warehouseman to deliver any grain stored in a special bin or by itself on any receipt or order for graded grain.

SEC. VIII. On return of any warehouse receipt, properly
35 endorsed, prior to 5 p. m. of any business day, and the tender of all charges upon the property represented by it, such property shall be promptly deliverable to the holder of such receipt, and it shall not be subject to any further charges for storage after demand for such delivery shall have been made, provided the vessel taking the same is ready at the stores at the time to receive it.

SECTION IX. Every warehouseman shall, on Monday morning of each week, cause to be made out and sent to the superintendent of the exchange a statement of the amount of each kind and grade of grain in store in his warehouse at the close of business on the previous Saturday, and shall also send a copy of the same to the registrar of the New York Produce Exchange. It shall also be the duty of the warehouseman to furnish daily to the same registrar a correct statement of the amount of each kind and grade of grain received in store in such warehouse on the previous day ending at 6 p. m.; also the amount of each kind and grade of grain delivered by such warehouseman during the previous day ending at 6 p. m., and what warehouse receipts have been issued and cancelled upon which the grain has been received or delivered on such day, giving the number of each receipt and the amount, kind, and grade of grain received and delivered upon each; also how much grain, if any, was so delivered, and the kind and grade for which warehouse receipt had not been issued and when and how such unreceipted grain was received by him, and the warehouseman making such statements shall, in addition, furnish the said registrar any further information regarding receipts issued or cancelled that may be necessary to enable
36 him to keep up a full and correct record of all receipts issued and cancelled and of grain received and delivered.

SEC. X. No warehouseman shall be permitted to mix any grain of different grades together other than identity preserved grain, or to select different qualities of the same grade for the purpose of storing or delivering the same, nor shall he attempt to deliver grain of one grade for another, or in any way tamper with grain while in his possession or custody with a view of securing profit to himself or any other person. Nothing in this rule, however, shall prevent any warehouseman from moving grain while within his warehouse for its preservation or safe keeping.

SEC. XI. All persons owning property or who may be interested in the same in any regular warehouse, upon proper application to the proprietor, and all duly authorized inspectors of such property shall at all times, during ordinary business hours, be at full liberty to examine any and all graded grain stored in any regular warehouse in this port, and all proper facilities shall be extended to such person by the warehouseman, his agents and servants, for an exam-

ination, and all parts of warehouses shall be free for his inspection and examination of such person or of any authorized inspector of such property.

SEC. XII. The president, subject to the approval of the board of managers, shall appoint a committee of three (3), consisting of one warehouseman, one exporter, and one receiver of grain, to whom shall be referred all disputed questions relating to the delivery of graded grain from warehouse, and the decision of such question by the committee shall be final.

37 The committee shall keep a record of their proceedings, and shall receive a fee of fifteen ($15) dollars for each case heard by them, which fee shall be paid by the party adjudged to be in fault, unless otherwise ordered by the committee.

Vacancies in committee may be filled in the same manner as provided in rule 1 for filling vacancies in the committee on grain.

Defendant rests.

It appearing to me by the within information and testimony that the crime therein charged has been committed, and that there is sufficient cause to believe the said Edward Annan to be guilty thereof, I hereby order that he be held to answer the same before the undersigned, sitting as a court of special sessions in the city of Brooklyn, and that he be admitted to bail in the sum of $200 on said charge.

The said defendant, having failed to give bail as aforesaid, was by me committed to the sheriff of Kings county until he gives such bail.

ANDREW WALSH,
Police Justice.

38 "B"

Commitment.

STATE OF NEW YORK, }
County of Kings, } *ss:*

The sheriff of the county of Kings is required to receive and detain Edward Annan, who stands charged before me for the offence of violating chapter 581 of the laws of 1888 of the State of New York, to answer the charge before a court of special sessions in the city of Brooklyn.

Dated at the city of Brooklyn this 22d of June, 1888.

ANDREW WALSH,
Police Justice of the City of Brooklyn.

39 At a general term of the supreme court of the State of New York, second department, held at the county court-house, in the city of Brooklyn and county of Kings, N. Y., on the first day of October, 1888.

Present: Hon. Joseph F. Barnard, presiding justice.
" Calvin E. Pratt, "
" C. F. Brown, "

In the Matter of the Application of EDWARD ANNAN for Writs of *Habeas Corpus* and Certiorari.

The relator, Edward Annan, having been duly arrested on or about the 22d day of June, 1888, for the offence of violating chapter 581 of the laws of 1888 of the State of New York, and writs of *habeas corpus* and certiorari having been duly granted by this court on the 22d day of June, 1888, upon application of the said relator, returnable before the general term of this court in the first instance, now, on reading and filing the said writs of *habeas corpus* and certiorari and the returns thereto, and after hearing Messrs. Bergen & Dykman, counsel for relator, Edward Annan, in behalf of said writs, and Messrs. Hyland & Zabriskie, of counsel for the people, etc., in opposition thereto, and due deliberation having been had thereon, it is—

40 Ordered that said writs be, and the same are hereby, in all things dismissed, with $116.87 costs and disbursements of the people as taxed, and the prisoner is hereby remanded to the custody of the sheriff of the county of Kings, N. Y.

Enter.

C. E. P.,
J. S. C.

SIRS: Please take notice that the within is a true copy of an order in above-entitled action this day duly filed and entered in the office of the clerk of the above-named court in the county court-house, in the city of Brooklyn, New York.

Dated New York city, October 12th, 1888.

Yours, etc., HYLAND & ZABRISKIE,
Of Counsel for the People.

Office and P. O. address, No. 45 Broadway, New York city.

41 Supreme Court, General Term, Second Department.

In the Matter of the Application of EDWARD ANNAN for a Writ of *Habeas Corpus* and a Writ of Certiorari to Inquire into the Cause of His imprisonment.

Take notice that Edward Annan appeals to the court of appeals of the State of New York from the order of the general term of the supreme court made and entered herein in the office of the clerk of the county of Kings on the 12th day of October, 1888, dismissing the writs of certiorari and *habeas corpus* herein, and from each and every part of said order.

BERGEN & DYKMAN,
Attorneys for Edward Annan, App'l't,
189 *Montague Street, Brooklyn.*

To Hyland & Zabriskie, Esqs., attorneys for people and Canal Boat Owners' Association.

Hon. James W. Ridgway, district attorney of Kings county.

John M. Ranken, Esq., clerk of county of Kings.

42 Supreme Court.

In the Matter of the Application of EDWARD ANNAN.

In the Matter of the Application of F. E. PINTO.

BROWN, *J.*:

The defendants were arrested for violation of ch. 581 of laws of 1888, the first section of which reads as follows:

"SECTION 1. The maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State shall not exceed the following rates, namely: For elevating, receiving, weighing, and discharging grain, five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators the lake vessels or propellers, the ocean vessels or steamships, and canal boats shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading and trimming cargo when loading."

43 The defendant Annan was part owner and one of the agents for a floating elevator engaged in business in and about the harbor of New York, and the defendant Pinto is one of the firm of F. B. Pinto & Sons, engaged in business as warehousemen in the city of Brooklyn.

The complaint against the defendants is that on 21st day of June last they each charged the complainants for elevating, receiving, weighing, and discharging grain more than five-eighths of one cent a bushel.

Upon an examination held before a magistrate the defendants were committed to jail in default of bail pending their trial and have instituted these proceedings for the purpose of procuring their discharge upon the ground that the act of the Legislature aforesaid under which they were arrested violates that provision of the State constitution which provides that no person shall be deprived of life, liberty, or property without due process of law.

So much has been written within the last few years upon this constitutional safeguard and the meaning of the terms quoted has been so fully discussed in recent cases in both State and Federal courts that it would be superfluous for me to attempt to add anything to what the courts have already said or to do more than refer to the conclusions that have been reached and apply them to the case under consideration. For a full discussion of the subject I refer to the following cases:

Live Stock Association *vs.* The Crescent City, 1 Abb. U. S. Rep., 398.
Slaughter House Cases, 16 Wallace, 36.
Munn *vs.* Illinois, 94 U. S., 113.
Bertholf *vs.* O'Reilly, 74 N. Y., 509.
Matter of Jacobs, 98 N. Y., 98.
People *vs.* Marx, 99 N. Y., 377.
44 People *vs.* Gilson, 16 State Rep., 185.
Mugler *vs.* Kansas, 123 U. S., 623.

While the general proposition is conceded that a person living under our Constitution has the right to adopt and follow such lawful business not injurious to the community as he chooses, yet this right is subject to the power inherent in the Legislature to regulate the use of all property and the conduct of all citizens toward each other when necessary for the public good.

This power is usually denominated the police power of the State. Its exact boundaries and limitations have never been judicially established by any general rule, and probably never will be. Each case as it arises must be determined upon its own facts. While it may be difficult in many cases to reconcile the conclusions of different courts upon similar facts, all agree upon a few general rules that must control in determining the validity of the law.

Courts are confined to the single question whether the act in question exceeds the utmost limits of legislative power. If it does not—if it can stand when brought to the test of the Constitution—the question of its validity is at an end, and the judicial department of the Government cannot refuse to recognize and enforce it. It may be opposed to our opinion of natural justice or its operation may appear to be inequitable towards a large class of citizens, but if it is a valid exercise of legislative power we cannot judicially condemn it.

It was said by Chief Justice Waite, in Munn *vs.* Illinois, "For us the question is one of power, not of expediency. If no state of circumstances can justify such a statute, then we may declare this one void, but if it could we must presume it did. Of the propriety of legislative interference within the scope of legislative power the Legislature is the exclusive judge. The controlling fact is the power to regulate at all. If that exists the right to establish the maximum of charges as one of the means of regulation is implied."

In People *vs.* Marx, Rapallo, J., states the question as follows: "Conceding that the only limits upon the legislative power of the State are those imposed by the State constitution and that of the United States, we are called upon to determine whether or not these limits are transgressed by an enactment of this description."

Judge Cooley, in his work on Constitutional Limitations, p. 222, says: "Whether a statute is constitutional or not is always a question of power. In any case in which the question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. If evidence was required, it must be supposed that it was before the Legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act it would seem that the passage of the act itself might be held equivalent to such finding."

We have, therefore, but a single question in the case, viz:

Has the Legislature the right to regulate the use of property of the character specified in the act in question at all?

This question must receive an affirmative answer. The power has been exercised as to various classes of property since the formation of the State, and the reports are full of decisions upholding the authority of the State to regulate the use and enjoyments of prop-

erty and the control of private business in many ways;
46 and, in the case of grain-elevating business, we have the case of Munn *vs.* Illinois as a distinct adjudication in favor of the validity of such a law as the one in question.

The citations I have made are a sufficient answer to the arguments of the learned counsel for the appellants that this case can be distinguished from the Munn case on the ground that the validity of the Illinois statute was placed on the fact that the Chicago warehousemen had a virtual monopoly of the elevator business, and that the facts here show that no monopoly could exist.

How can this court say that no monopoly exists or may not exist in some or all of the cities of this State named in the law if it be that the existence of a monopoly is the fact which justifies such legislation? We must assume that the Legislature had evidence before it which created the demand for legislative regulation, and we cannot review its decision upon that question. Certainly the evidence taken upon a prosecution for violation of the provisions of the law cannot justify the assertion that the facts surrounding the business did not create a demand for the law.

As was said by Chief Justice Waite in the Munn case, "If any state of circumstances would justify such a statute we must presume they exist."

I fail to see how we can give any effect to the evidence taken before the magistrate on the question of the law's constitutionality.

The act is not made applicable to persons who possess a virtual monopoly of the business of elevating grain, but to certain political divisions of the State, and within those divisions is applicable to every individual.

47 It cannot be a valid law as to Mr. Annan and an invalid one as to Mr. Pinto, and yet if the court is to determine in every case that arises under the law whether or not a monopoly exists we might reach different conclusions in different cases.

It would certainly be a strange system of practice, assuming the court could review the decision of the Legislature upon questions within the scope of legislative power, that it should do so without having before it the evidence on which the legislative decision was based.

But such is not the law.

In Bertholf *vs.* O'Reilly, 74 N. Y., the court of appeals asserted that there was no limitation upon legislative power, except the limits and restraints of the Constitution, and against the point so ably argued by the learned counsel for defendants, that the court will look into the evidence taken on the trial and see whether a proper case exists for legislative interference. The case of People *vs.* Cipperly, 101 N. Y., 634, the opinion of Learned, justice, 37 Hun., 324, is a direct authority.

In considering the question whether the Legislature could prohibit the sale of milk drawn from healthy cows which in its natural state falls below the standard fixed by the act that learned justice says:

"Is that to be a question for the jury? If so, the court must

charge a jury in each case that if they find milk below the standard to be unwholesome, then the statute is constitutional; if they find it wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled or rather unsettled in that way.

48 The constitutionality would vary with the varying judgment of juries."

This opinion was adopted as the opinion of the court of appeals. But I can see no distinction between the two cases.

The circumstances surrounding the business in this State are apparently the same as in the Chicago case.

The great grain-producing region of the West and Northwest, sending its grain by rail and water to Chicago and making that city one of the great markets of the world, created a demand for means to handle and store the grain, and these means were found in the elevators and warehouses.

Fourteen elevators and warehouses adapted to this business in the city of Chicago, the case states, were controlled by nine business firms, by whom the prices for elevating and storing grain were fixed and regulated.

In this case we know that all grain brought into the cities named in the act in question arrived in cars or boats; that, whether it be stored in warehouses or reshipped to other places, it demands stationary and floating elevators to handle it; that in the harbor of New York, the evidence informs us, at least five different business firms operate and control floating elevators, and that the charges are fixed by a committee of the produce exchange, of which body some or all of these firms are members.

It is apparent, therefore, that the opportunity for a virtual monopoly is the same in each case. The element necessary to create it in each case was combination, and whether these was or had been or might be such a combination as to justify the interference of

49 the Legislature to regulate the use of this class of property we must presume was a question upon which the Legislature had sufficient evidence.

At all events it is impossible for me to distinguish this case from the Illinois case. That statute is a precedent for legislation of this character, and the decision of the supreme court of that State and of the Supreme Court of the United States and the substantial approval it received from the court of appeals in Bertholf *vs.* O'Reilly are decisive of the constitutionality of the law.

The Slaughter-House cases (16 Wallace, 36; Mobile *vs.* Yerille, 3 Abb. U. S., 140, and Berthoff *vs.* O'Reilly, 74 N. Y., 509) are also distinct authorities in favor of the validity of laws of this character.

In the latter case it was sought to have declared invalid that part of the civil damage act which makes the owner of real estate liable for damage resulting from the sale of liquor upon his property upon the same ground that the law under consideration is now attacked, but the court of appeals held that it was a proper regulation of the use of property, and in the opinion cite the Slaughter-House case and the Munn case with approval, as furnishing examples of the

due exercise of the police power by the State, and Judge Andrews, speaking of and quoting from them, says that "they illustrate the scope of the police power in legislation."

There is nothing in the more recent decisions of our court of appeals to which we have been referred that is in conflict with the authorities I have cited.

In People *vs.* Gilson the court held that chapter 691, Laws of 1887, was in no aspect valid as a health law, nor was it a regulation of the use of property or of trade in food.

50 Chapter 202, Laws of 1884, section 4, which was declared invalid in People *vs.* Marx, absolutely prohibited the manufacture or sale of an article of food — of any substitute for butter or cheese, however wholesome or however openly and fairly its character was avowed and published.

Such a law has nothing in common with the law in question.

The tenement-house cigar act (ch. 272, Laws of 1884), considered in matter of Jacobs, was declared invalid for the reason that it was apparent on the face of the law that it was not intended to protect health nor as a regulation of the use of property. Says Earl, J.: "It does not deal with tenement-houses as such; it does not regulate the number of persons who may live in any one of them or be crowded into one room; nor does it deal with the mode of construction for the purpose of securing the health and safety of their occupants or of the public generally. * * * It was not intended to protect the health of those engaged in cigar-making nor to protect the health of that portion of the public not residing in the forbidden tenement-houses, nor was it intended to improve or protect the health of the occupants of tenement-houses. It is plain that it is not a health law and that it has no relation whatever to the public health."

Such a law has clearly nothing to justify or support it, and was a plain invasion of the constitutional rights of the persons affected by it.

Laws which are intended to regulate the use of property in connection with the great products of the country, and especially with the necessaries of life, are plainly not to be classed with such laws as were considered in the cases just cited.

51 The sale of the property may not be prohibited when it is not unlawful nor injurious to the public and when its character is frankly avowed.

Nor can lawful employment be prohibited when its prosecution is not injurious to those engaged in it nor to the general public, without violating the safeguards of the Constitution. But property used in handling and storing the great staple articles of food and the necessaries of life, by which use a tax or toll is levied thereon, ceases while applied to such use to *juris privati* only and becomes affected with a public interest, and such use may be regulated by the Legislature without encroaching upon any of the constitutional rights of the owner.

I think the law in question valid, and the proceedings must there-

fore be dismissed, and the defendants remanded to the custody of the sheriff.

52 At a special term of the supreme court held in and for the county of Kings, at the court-house, in the city of Brooklyn, on the 27th day of November, 1889.

Present: Hon. Willard Bartlett, justice.

THE PEOPLE *ex Rel.* EDWARD ANNAN, Appellant,
against
ANDREW WALSH, Police Justice of the City of Brooklyn, Respondent.

THE PEOPLE *ex Rel.* EDWARD ANNAN, Appellant,
against
CLARK D. RHINEHART, Sheriff of the County of Kings, Respondent.

The above-named appellant having appealed to the court of appeals from the order of the general term of this court made and entered herein in the office of the clerk of the county of Kings on the 12th day of October, 1888, and said court of appeals having affirmed said order—

Now, on reading and filing the remittitur from the said
53 court of appeals and on motion of Bergen & Dykman, attorneys for the appellant—

It is ordered that the judgment of the court of appeals affirming said order be, and the same hereby is, made the judgment of this court, and that the aforesaid order entered herein on the 12th day of October, 1888, be, and the same is hereby, affirmed, and that judgment of this court be entered herein affirming said judgment.

Enter.

WILLARD BARTLETT, *J. S. C.*

Granted Nov. 27, 1889.

WM. J. KAISER, *Clk.*

54 [Endorsed:] Supreme court, Kings county. The people *ex rel.* Edward Annan, appellant, against Andrew Walsh, police justice of the city of Brooklyn, respondent. The People *ex rel.* Edward Annan, appellant, against Clark D. Rhinehart, sheriff of the county of Kings, respondent. Copy order. On remittitur from court of appeals. Bergen & Dykman, attorneys for appellant, 189 Montague street, Brooklyn, N. Y. To —— ——, Esq., attorney for —.

[Endorsed:] Service of a copy of within order and notice of entry of the same is hereby admitted. Dated November 29th, 1889. Hyland & Zabriskie, of counsel for respondent.

55 Supreme Court, Kings County.

THE PEOPLE *ex Rel.* EDWARD ANNAN, Appellant,
against
ANDREW WALSH, Police Justice of the City of Brooklyn, Respondent.

THE PEOPLE *ex Rel.* EDWARD ANNAN, Appellant,
against
CLARK D. RHINEHART, Sheriff of the County of Kings, Respondent.

Judgment, Nov. 27th, 1889.

The above-named appellant having appealed to the court of appeals from the order of the general term of this court heretofore entered herein, on the 12th day of October, 1888, and the said court of appeals having heard the said appeal and ordered and adjudged that the said order so appealed from be affirmed, and the remittitur from the said court of appeals having been duly filed in this court, and an order duly entered thereon making the judgement of the
56 court of appeals the judgement of this court and directing judgment to be entered herein, now, upon motion of Bergen & Dykman, attorneys for appellant, it is adjudged that the order hereinbefore mentioned, entered herein on the 12th day of October, 1888, be, and the same is hereby, affirmed.

WM. J. KAISER, *Clerk.*

57 [Endorsed:] 40–464. Supreme court, Kings county. The People *ex rel.* Edward Annan, appellant, against Andrew Walsh, police justice of the city of Brooklyn, respondent. The People *ex rel.* Edward Annan, appellant, against Clark D. Rhinehart, sheriff of the county of Kings, respondent. Judgment on remittitur from c't of appeals. Bergen & Dykman, attorneys for appellant, 189 Montague Stre., Brooklyn, N. Y. Filed Nov. 27, 1889. To —— ——, Esqr., attorney for —— ——.

58 In the Supreme Court of the United States.

THE PEOPLE *ex Rel.* EDWARD ANNAN
against
ANDREW WALSH, Police Justice of the City of Brooklyn.

THE PEOPLE *ex Rel.* EDWARD ANNAN
against
CLARK D. RHINEHART, Sheriff of the County of Kings, State of New York.

STATE OF NEW YORK, *County of Kings,* } *ss:*

Henry W. Slocum, Jr., being duly sworn, says: I am an attorney and counsellor-at-law of the State of New York, residing in the city of New York, practicing in the city of Brooklyn, and I am upwards of twenty-one years.

On December 9, 1889, I filed the original writ of error issued out of the Supreme Court of the United States in the actions above entitled with the county clerk of Kings county, he being the clerk of the supreme court of the State of New York for the said county, and his office being the office wherein is filed the record of the proceedings in the court of appeals of the State of New York in the matters above entitled. At the same time I lodged a copy of
59 the said writ of error with the said county clerk of Kings county and filed with him the bond approved by Mr. Justice Blatchford.

On December 9, 1889, I served on the Hon. James W. Ridgway, district attorney for the county of Kings, State of New York, the citation in the above-entitled actions, by exhibiting to the said James W. Ridgway the original citation and leaving a copy with him. On the same day I served the said citation on Clark D. Rhinehart, sheriff of Kings county, by exhibiting to a clerk or deputy in the office of said sheriff the original citation and leaving a copy with him.

On the same day I served the said citation on John J. Walsh, police justice in the city of Brooklyn, successor to Andrew Walsh, one of the parties above named, by exhibiting to him the original citation and leaving a copy with him.

On December 10th, 1889, I served the said citation on Messrs. Hyland & Zabriskie, of counsel for the defendants in the actions above entitled, by exhibiting the original citation to them and leaving a copy with them, and on the same day I served on said Messrs. Hyland & Zabriskie the petition, the bond, and the writ of error in the actions above entitled by delivering to and leaving with the said Hyland & Zabriskie copies thereof.

H. W. SLOCUM, Jr.

Sworn to before me this 15 day of January, 1890.

A. F. BRITTON,
Notary Public, Kings Co.

60 [Endorsed:] In the Supreme Court of the United States. The People *ex rel.* Edward Annan against Andrew Walsh, police justice of the city of Brooklyn. Affidavit of service of citation, &c. Bergen & Dykman, attorneys for plaintiff, 189 Montague street, Brooklyn, N. Y. To —— ——, Esq., attorney for —.

61 State of New York:

Court of Appeals, Clerk's Office.

I, Gorham Parks, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copies of opinions in the cases of The People *vs.* J. Tallman Budd and The People *ex rel.* Edward Annan *vs.* Andrew Walsh, police justice of the city of Brooklyn, and Clark D. Rhinehart, sheriff of the county of Kings, and People *ex rel.* F. E. Pinto, *vs.* The Same with the originals on file in this office, and that the same are correct transcripts therefrom and of the whole of said originals.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this tenth day of January, A. D. 1890.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS, *Clerk.*

62 In the Court of Appeals of the State of New York.

THE PEOPLE *ag'st* J. TALLMAN BUDD. } No. 62.

ANDREWS, *J.:*

The main question upon this record is whether the legislation fixing the maximum charge for elevating grain contained in the act, chapter 581 of the laws of 1888, is valid and constitutional. The act, in its first section, fixes the maximum charge for receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State at five-eighths of one cent a bushel, and for trimming and shoveling to the leg of the elevator in the process of handling grain by means of elevators "lake vessels or propellers, the ocean vessels or steamships, and canal boats" shall, the section declares, only be required to pay the actual cost. The second section makes a violation of the act a misdemeanor, punishable by fine of not less than $250. The third section gives a civil remedy to a party injured by a violation of the act. The fourth section excludes from the operation of the act any

63 village, town, or city having less than 130,000 population. The defendant, the manager of a stationary elevator in the city of Buffalo, on the 19th day of September, 1888, exacted from the Lehigh Valley Transportation Company for elevating, raising, and discharging a cargo of corn from a lake propeller at his elevator the sum of one cent a bushel, and for shoveling to the leg of the elevator the carrier was charged and compelled to pay four dollars for each thousand bushels. The shoveling of grain to the leg of an elevator at the port of Buffalo is now performed, pursuant to an arrangement made since the passage of the act of 1868, by a body of men known as the Shovelers' Union, who pay the elevator one dollar and seventy-five cents a thousand bushels for the use of the steam shovel, a part of the machinery connected with the elevator, operated by steam, and who for their services and the expense of the steam-shovel charge the carrier for each thousand bushels of grain shoveled the sum of four dollars. The defendant was indicted for a violation of the act of 1888. The indictment contains a single count, charging a violation of the first section in two particulars, viz., in exacting more than the statute rate for elevating the cargo and exacting more than the actual cost for shoveling the grain to the leg of the elevator. Before reaching the main question there is a subordinate question to be considered. The defendant on the trial raised the question of the constitutionality of the act of 1868, and also insisted that as to the alleged overcharge for shoveling the

facts did not show that the defendant had received anything for that service or that the cargo had been charged more than the actual cost, and excepted to the submission to the jury of that branch of the case. The trial judge overruled both
64 points and submitted the case to the jury in both aspects, who found a general verdict of guilty, and thereupon the court imposed upon the defendant a fine of $250. It is now urged that, assuming the constitutionality of the act of 1888, the judgment should be reversed for the reason that no overcharge by the defendant for shoveling was proved, and also that the sum paid for shoveling was paid to the Shovelers' Union, the defendant only receiving threout from the union the rent agreed for the use of the steam-shovel. There are two answers to this proposition. The words "actual cost" used in the statute were manifestly intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator. The purpose of the act could be easily evaded and defeated if the elevator owners were permitted to separate the services and charge for the use of the steam-shovel any sum which might be agreed upon between themselves and the Shovelers' Union, and thereby under color of charging for the use of the steam-shovel exact of the carrier a sum for elevating beyond the rate fixed by the act. There is a second answer to the proposition. It was undisputed that the defendant exacted a greater charge for elevating than the sum allowed by the act. This was proven by testimony on the part both of the prosecution and the defendant. The verdict of guilty was followed by the infliction of the lowest penalty for a single offense. The verdict and sentence were justified with-
65 out considering whether an offense was made out under the second allegation in the indictment. No question as to the form of the indictment was made. The joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of a judgment where there is a general verdict and the sentence is single and is appropriate to either of the counts upon which the conviction was had (Polinsky *v.* People, 73 N. Y., 65). Even if the alleged overcharge for shoveling was not made out the verdict and sentence are supported by the findings of the jury on the other branch of the case, and the refusal of the judge to withdraw from the jury the consideration of the question, whether there was an overcharge for shoveling, could not prejudice the defendant. Passing therefore this point we come to the main question, and that is whether legislative power under the State constitution exists in the Legislature to prescribe a maximum charge for elevating grain by stationary elevators owned by individuals or corporations who have appropriated their property to this use and are engaged in this business. The ascertainment of the exact boundaries of legislative power under the rigid constitutional systems of the American States is in many cases attended with great perplexity and difficulty. The people have set into the frame-work of the Constitution a variety of

restrictions upon legislative power, and chief among them is that which ordains that no person shall be deprived of life, liberty, or property without due process of law. There is but little difficulty in determining the validity of a statute under this constitutional principle in cases where the statute assumes to divest the owner of property of his title and possession or to actually deprive him of his personal liberty. The State may lawfully take the property or life of the citizen without infringement of the con-
66 stitutional guaranty. The cases where the right of property is set aside by positive laws are various. Distress, executions, forfeitures, taxes, are of this description, "wherein," said Lord Camden, in Entick *v.* Carrington (19 How. St. Tr., 1066), "every man by common consent gives up that right for the sake of justice and the common good." The State may directly take private property for public use on the condition of making compensation, and the cases where it may be taken in satisfaction of public and private obligations or for the support of government or as a return for governmental protection are determined by general rules well understood and easily applied. The difficulty in the application of the constitutional principle arises in the main in respect to that class of legislation, not infrequent, which, while it does not in a strict sense deprive an individual of his property or liberty, does nevertheless in many cases, by the imposition of burdens and restrictions upon the use and enjoyment of property and by restraints put upon personal conduct, seriously impair the value of property and abridge freedom of action. The validity of legislation of this kind to some extent and within certain limits is questioned by none. But such legislation may overpass the boundaries of legislative power and violate the constitutional guaranty, for it is now an established principle that this guaranty protects property and liberty, not merely from confiscation or destruction by legislative edicts, but also from any essential impairment or abridgement not justified by the principles of free government. This court has recently, in several notable instances, vindicated the rights of individuals against unjust and arbitrary legislation, restraining freedom of action or impos-
67 ing conditions upon private business not warranted by the Constitution (*In re* Jacobs, 98 N. Y., 98; People *v.* Marx, 99 *id.*, 377; People *v.* Gillson, 109 *id.*, 399); but the very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the Legislature to impose restraints and burdens required by the public good or proper and necessary to secure the equal rights of all. This power of government, the power as expressed by Taney, Ch. J. (5 How., 583), "inherent in every sovereignty, the power to govern men and things," is not, however, an uncontrollable or despotic authority subject to no limitation, exercisable with or without reason in the discretion or at the whim or caprice of the legislative body; but within

its legitimate domain the power is original, absolute, and indefeasible. It vested in the legislative department of the Government at its creation, without affirmative grant or definition, as an essential political power and attribute of government, and personal rights and rights of property are subordinate to this supreme power acting within its appropriate sphere. It may be exercised so as to impair the value of property or limit or restrict the uses of property, yet in this there is no infringement of the constitutional guaranty, because that guaranty is not to be construed as liberating persons or property from the just control of the laws. It was designed for the protection of personal and private rights against encroachments by the legislative body not sanctioned by the principles of civil liberty as
68 held and understood when the Constitution was adopted. The boundary of legislative power in the enactment of laws in the assumed exercise of this power of sovereignty, which injuriously affects persons or property, is indistinct, and no rule or definition can be formulated under which, in all cases, it can be readily determined whether a statute does or does not transgress the fundamental law. The power of the British Parliament is not the test of legislative power under the written Constitution of the American States. But the great landmarks of civil liberty embodied in our State constitutions were established by our English ancestors, and upon questions such as the one now before us we may study with profit the principles and practice of the law of England. When a statute is challenged as overstepping the boundaries of legislative power, the object sought to be attained by the Legislature, the nature and functions of government, the principles of the common law, the practice of legislation, and legal adjudications are pertinent and important considerations and elements in the determination of the controversy. The act now in question regulates the price of elevating grain, and the regulation affects the compensation which may be lawfully demanded for labor and personal services, as well as for the use of property. It fixes a maximum charge for labor and the use of property when combined, as they of necessity are, in the business of elevating grain. The operation of the statute is by its terms limited to the business carried on in cities and towns having a population of not less than 130,000, practically to the cities of Buffalo, New York, and Brooklyn. The circumstances also substantially restrict the application of the act to grain brought to Buffalo from the upper lakes by water, and there, by means
69 of elevators, transshipped into canal boats and transported through the Erie canal and the Hudson river to the harbor of New York, and there discharged by elevators into warehouses or ocean vessels. The business of transporting grain by the lakes and thence by the Erie canal to New York is one of great magnitude. The case shows that about 120,000,000 of bushels of grain annually come to Buffalo from the West. The business of elevating grain at that point is mainly connected with lake and canal transportation. It is shown by official records that the receipts of grain at New York in the year 1887 by way of the Erie canal and Hudson river during the season of canal navigation exceeded 46,000,000 bushels, an

amount very largely in excess of the amount received during the same period by rail and by river and coastwise vessels. The elevation of this grain from lake vessels to canal boats takes place at Buffalo, where the case shows there are thirty or forty elevators, stationary and floating. How many of these elevators are actually employed in the business does not appear. The record is silent as to many facts which might tend to explain the relation of this business as actually conducted to the public interests. It is asserted that a combination exists, and has for several years existed, between the elevator owners to maintain excessive charges by fixing a uniform tariff and pooling the earnings and dividing them ratably among all the elevator owners, although but a part of the elevators are actually operated. (See report of the committee on foreign commerce of the Chamber of Commerce of New York, made in April, 1885.) There is no evidence in the record as to the locations in the port of Buffalo suitable and available for stationary elevators. It is evident that they must be placed where they can be reached by both
70 lake vessels and canal boats, and it may reasonably be assumed that but a limited area (not devoted to other purposes of commerce) is available for the erection of stationary elevators. The case of Munn *v.* Illinois (94 U. S., 113) is a direct authority upon the question now before us. That case was brought to the United States Supreme Court on a writ of error to review a judgment of the supreme court of the State of Illinois, which affirmed the constitutionality of a statute of that State fixing a maximum charge for the elevation and storage of grain in warehouses in that State. The act was challenged as a violation of the constitutional guaranty in the constitution of Illinois protecting life, liberty, and property in substantially the same language as in the constitution of this State. The Supreme Court of the United States affirmed the judgment of the State court on the ground that the legislation in question was a lawful exercise of legislative power and did not infringe the clause in the fourteenth amendment of the Constitution of the United States, "nor shall any State deprive any person of life, liberty, or property without due process of law." The legislation in question in Munn *v.* Illinois was similar to and is not distinguishable in principle from the act, chap. 581 of the laws of 1888, now under review. The question in that case was raised by an individual owning an elevator and warehouse in Chicago, which had been erected for and in connection with which he had carried on the business of elevating and storing grain for many years prior to the passage of the act in question, and prior also to the adoption of the amendment of the constitution of Illinois, in 1870, declaring all elevators and warehouses where grain or other property is stored for a compensation to be public warehouses. The case of Munn *v.* Illinois has been
71 referred to by the court in several cases. (People *ex rel.*, etc., *v.* Boston and Albany R. R. Co., 70 N. Y., 569; Bertholf *v.* O'Reilly, 74 *id.*, 509; Buffalo East Side R. R. Co. *v.* Buffalo Street R. R. Co., 111 *id.*, 132; People *v.* King, 110 *id.*, 418.) In People *ex rel.*, etc., *v.* Boston and Albany R. R. Co., which related to the power of the Legislature to compel the defendant to build a bridge at a

point where the railroad of the defendant crossed a highway, the court, by Earl, J., said: "The whole subject of the legislative power over railroads and even private persons holding and using their property for public purposes has been so fully discussed recently in the Supreme Court of the United States, in the Granger cases and in the Chicago elevator case, as to make further discussion unnecessary here. Such legislation violates no contract, takes away no property, and interferes with no vested right." In Bertholf *v.* O'Reilly, Munn *v.* Illinois was cited as illustrating the scope of the police power in legislation. In Buffalo East Side Railroad Company *v.* Buffalo Street Railroad Company, which involved the question of the right of the Legislature to regulate and reduce the fare on street railways in the city of Buffalo, which it was claimed affected a contract entered into between two of the companies prior to the passage of the act, this court affirmed the validity of the law, and Ruger, Ch. J., in pronouncing the opinion of the court, quoted the language of Waite, Ch. J., in the Munn case, and also the language of Bradley, J., in the sinking-fund cases (99 U. S., 747), declaring the principle decided in the Munn case, and these quotations were quite irrelevant unless the doctrine stated therein was intended to be approved. In The People *v.* King the doctrine of the Munn case was applied by this court to uphold the validity of a
72 statute which prohibited the exclusion of any citizen from theaters or other places of amusement by reason of race, color, or previous condition of servitude, and a conviction in that case was sustained where the defendant, the proprietor of a skating rink, erected on his own property, opened it to the public, but excluded therefrom, on the occasion of a public entertainment, on the ground of race and color, a colored person who sought admission. The court is not concluded by these cases, or any of them, from reëxamining the principle on which the decision in Munn *v.* Illinois proceeded, but we cannot overrule and disregard that case without, as I think, subverting the principle of our decision in the King case, and certainly not without disregarding many deliberate expressions of this court in approval of the principle of that decision. It is an interesting question as to what consideration should be given by a State court to a decision of the Supreme Court of the United States upon a question of constitutional law, rendered in the exercise of its jurisdiction, where the point in judgment relates to the validity of a State statute, which is challenged on the ground that it deprives a party of life, liberty, or property without due process of law, and the decision affirms the constitutionality of the statute. The jurisdiction of the Supreme Court of the United States to review the decision of a State court sustaining a State statute which is alleged to be a violation of this constitutional principle originated with the adoption of the fourteenth amendment of the Constitution of the United States, which for the first time introduced into the Federal Constitution the prohibition, "nor shall any State deprive any person of life, liberty, or property without due process of law." This was a
73 new limitation in the Federal Constitution on the State governments. Prior to the adoption of the fourteenth amend-

ment personal rights and rights of property were, as a rule, exclusively matters of State cognizance, and the State courts were the ultimate tribunals for the determination of questions arising under the constitutional guaranty of life, liberty, and property, which was to be found only in the State constitutions. Their decisions were not subject to review in the courts of the United States. (Slaughter-house cases, 16 Wall., 36.) There were exceptions growing out of article 1, section 10, of the Federal Constitution, that "no State should pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," not material here. Since the fourteenth amendment the question whether a State statute infringes the constitutional guaranty protecting life, liberty, and property, where it arises in a State court, involves the consideration of both the Federal and State Constitutions, although the ground of construction and decision would be identical under either instrument. But whether the decision of the State court presents a Federal question reviewable on appeal to the Supreme Court of the United States depends on the nature of the decision of the State court—that is to say, whether it affirmed the validity of the statute or held it to be unconstitutional and void. If the State court decides that the statute does violate the constitutional guaranty its decision is now, as before the fourteenth amendment, final and conclusive, and no appeal can be taken to the Federal court, as in that case no right under the Constitution and laws of the United States has been denied. If, on the other hand, the State court sustains the statute and denies the right asserted the Federal jurisdiction attaches and an appeal may be taken to the United States Supreme Court.

74 It cannot be maintained, we think, that a decision of the Federal court sustaining a State statute is *res adjudicata* and binding upon a State court when the same question subsequently arises there under a similar statute. It would still be the duty of the State court to examine the question and decide it according to its interpretation of the constitutional guaranty; but the respect due to the decision of that high tribunal, the fact that to it has been committed by the consent of the States the ultimate vindication of liberty and property against arbitrary and unconstitutional State legislation, and the fitness of things emphasize and enforce in the particular case the settled rule that only when required by the most cogent reasons, nor, indeed, unless compelled by unanswerable grounds, will a court declare a statute to be unconstitutional. "On more than one occasion," said Chief Justice Marshall in the Dartmouth College case (4 Wheat., 625), "this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution. The power of the Legislature to regulate the charge for elevating grain, where the business is carried on by individuals upon their own premises, depends upon the question whether the regulation falls within the scope of what is called the police power, which is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the

State necessary for the public welfare. The existence of this power is universally recognized. All property, all business, every private interest may be affected by it and be brought within its influence. Under this power the Legislature regulates the uses
75 of property, prescribes rules of personal conduct, and in numberless ways through its pervading and ever-present authority supervises and controls the affairs of men in their relations to each other and to the community at large to secure the mutual and equal rights of all and promote the interests of society. It has limitations. It cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property; but a statute does not work such a deprivation in the constitutional sense simply because it imposes burdens, or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters indifferent, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview as that power was defined and understood when the Constitution was adopted. The generality of the terms employed by jurists and publicists in defining this power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite and impose upon the court the necessity and duty as each case is presented to determine whether the particular statute falls within or outside of its appropriate limits." "It is much easier," said Chief Justice Shaw in Com. *v.* Alger (7 Cush., 53), "to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise." In determining whether the Legislature can lawfully regulate and fix the charge for elevating grain by private elevators it must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as
76 a general rule, not the subject of legislative regulation. These are a part of our liberty of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case the statute of 1888 cannot be sustained; that no general power resides in the Legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty. The justification of the statute of Illinois regulating the charge for elevating and storing grain in the elevators of that State was placed in the Munn case upon that principle of the common law stated by Lord Hale in

his treatise *De Portibus Maris* (1 Harg. Law Tracts, 78), that when private property is "affected by a public interest it ceases to be *juris privati* only." The principle of the decision is stated with great perspicuity by Bradley, J., in his opinion in the sinking-fund cases (*supra*). He says: "The inquiry there was as to the extent of the police power where the public interest is affected; and we held that where an employment becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen—in other words, when it becomes a practical monopoly, to
77 which the citizen is compelled to resort and by means of which a tribute can be exacted from the community—it is subject to regulation by the legislative power." The elevators in Chicago had no legal monopoly in the business of elevating grain. The business was open to all comers, but the location of the elevators, their connection with the railroads, on which most of the grain from the grain-producing States and Territories of the West and Northwest was brought to Chicago, the necessity of using them in the transfer, storing, and transshipment of grain created, as was held by the court, a virtual and practical monopoly which affected the business and property with a public interest and subjected them to regulation by law. The application of the language of Lord Hale and of the principle that private property may by its uses cease to be *juris privati* strictly and become affected by a public interest to the business of elevating grain in Chicago was combatted and denied by Field, J., in his very able and forcible dissenting opinion. "It is," he declared, "only where some privilege in the bestowment of the Government is enjoyed in connection with (private) property that it is affected by a public interest in any proper sense of the terms. It is the public privilege connected with the use of the property which creates the public interest in it." There can be no doubt that where the Government confers a special privilege upon a citizen, not of common right, it may annex such conditions upon its enjoyment as it sees fit. Nor can there be any question that where an individual has a legal monopoly to use his property for a public purpose, and the public have an interest in the use, he is subject to an obligation cast upon him by the common law to demand only a reasonable compensation for the use.
This is stated with great clearness by Lord Ellenborough
78 in Allnut *v.* Inglis (12 East, 569). "There is," he said, "no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly he must as an equivalent perform the duty attached to it on reasonable terms." But the question is whether the power of the Legislature to regulate charges for the use of property and the rendition of services connected with it depends in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose or has some special protection from the Government or some

peculiar benefit in the prosecution of his business. Lord Hale, in the treatises *De Portibus Maris* and *De Jure Maris*, so largely quoted from in the opinions in the Munn case, used the language that when private property is "affected with a public interest it ceases to be *juris privati* only," in assigning the reason why ferries and public wharves should be under public regulation and only reasonable tolls charged. The right to establish a ferry was a franchise, and no man could set up a ferry, although he owned the soil and landing places on both sides of the stream, without a charter from the king or a prescription time out of mind. The franchise to establish ferries was a royal prerogative, and the grant of the king was necessary to authorize a subject to establish a public ferry, even on his own premises. When we recur to the origin and purpose of this prerogative it will be seen that it was vested in the king as
79 a means by which a business in which the whole community were interested could be regulated. In other words, it was simply one mode of exercising a prerogative of government—that is to say, through the sovereign instead of through Parliament in a matter of public concern. This and similar prerogatives were vested in the king for public purposes, and not for his private advantage or emolument. Lord Kenyon, in Rorke *v.* Dayrell (4 Term R., 410), said: "The prerogatives of the crown are not given for the personal advantage of the king, but they are allowed to exist because they are beneficial to the subject;" and it is said in Chitty on Prerogatives (page 4): "The splendor, rights, and power of the crown were attached to it for the benefit of the people, and not for the private gratification of the subject;" and Lord Hale, in one of the passages referred to, in stating the reason why a man may not set up a ferry without a charter from the king, says: "Because it doth in consequence tend to a common charge and is become a thing of public interest and use, and every man for his passage pays a toll which is a common charge, and every ferry ought to be under a public regulation." The right to take tolls for wharfage in a public port was also a franchise, and tolls, as Lord Hale says, could not be taken without lawful title by charter or prescription (*De Portibus Maris*, page 77). But the king, if he maintained a public wharf, was under the same obligation as a subject to exact only reasonable tolls; nor could the king authorize unreasonable tolls to be taken by a subject. The language of Lord Hale is explicit upon both these points: "If the king or subject have a publi wharf into which all persons that come to that port must come to unload their goods, as for the purpose, because they are the wharves only licensed by the queen, according to the
80 statute of 1 Elizabeth, chap. 11, or because there is no other wharf in that port, as it may fall out when a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc. Neither can they be enhanced to an immoderate degree, but the duties must be reasonable and moderate, though settled by the king's license or charter." The contention that the right to regulate the charges of ferrymen or wharfingers was founded on the fact that tolls could not be taken

without the king's license does not seem to us to be sound. It rested on the broader basis of public interest, and the license was the method by which persons exercising these functions were subjected to governmental supervision. The king, in whom the franchise of wharfage was vested as a royal prerogative, was himself, as has been shown, subject to the same rule as the subject, and could only exact reasonable wharfage, nor could he by express license authorize the taking of more. The language of Lord Hale, that private property may be affected by a public interest, cannot justly, we think, be restricted as meaning only property clothed with a public character by special grant or charter of the sovereign. The control which by common law and by statute is exercised over common carriers is conclusive upon the point that the right of the Legislature to regulate the charges for services in connection with the use of property does not in every case depend upon the question of legal monopoly. From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and even where the price of carriage was fixed by
81 the contract or convention of the parties the contract was not enforceable beyond the point of reasonable compensation. From time to time statutes have been enacted in England and in this country fixing the sum which should be charged by carriers for the transportation of passengers and property, and the validity of such legislation has not been questioned; but the business of common carriers until recent times was conducted almost exclusively by individuals for private emolument, and was open to every one who chose to engage in it. The State conferred no franchise and extended to common carriers no benefit or protection except that general protection which the law affords to all persons and property within its jurisdiction. The extraordinary obligations imposed upon carriers and the subjection of the business to public regulation were based on the character of the business, or, in the language of Sir William Jones, upon the consideration "that the calling is a public employment" (Jones on Bailments, Appendix). It is only a public employment in the sense of the language of Lord Hale, that it was "affected with a public interest," and the imposition of the character of a public business upon the business of a common carrier was made because public policy was deemed to require that it should be under public regulation. The principle of the common law that common carriers must serve the public for a reasonable compensation became a part of the law of this State, and from the adoption of the constitution has been part of our municipal law. It is competent for the Legislature to change the rule of reasonable compensation as the matter was left by the common law and prescribe a fixed and definite compensation for the services of common carriers. This principle was declared in the Munn case, which was
82 cited with approval on this point in Sawyer *v.* Davis (136 Mass., 239). It accords with the language of Chief Justice Shaw in Com. *v.* Alger (*supra*): "Whenever there is a general right on the part of the public, and a general duty of the land owner or any other person to

respect such right, we think it is competent for the Legislature by a specific enactment to prescribe a precise, practical rule for declaring, establishing, and securing such right and enforcing respect for it." The practice of the Legislature in this and other States to prescribe a maximum rate for the transportation of persons or property on railroads is justified upon this principle. Where the right of the Legislature to regulate the fares or charges on railroads is reserved by the charter of incorporation or the charter was granted subject to the general right of alteration or repeal by the Legislature the power of the Legislature in such cases to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers; but the cases are uniform that where there is no reservation in the charter the Legislature may nevertheless interfere and prescribe or limit the charges of railroad corporations. (The Granger cases, *supra;* Dow *v.* Beidelman, 125 U. S., 680; Earl, J., in People *ex rel. v.* Boston and Albany R. R. Co., *supra;* Ruger, Ch. J., in Buffalo East Side R. R. Co. *v.* Buffalo Street R. R. Co., *supra.*) The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the State, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The State, in constituting a corporation, may prescribe or limit its powers and reserve such control as it sees fit, and the
83 body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchise are the duties and obligations imposed by the act of incorporation; but when a corporation is created it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and, in the management of its property and business, is subject to regulation by the Legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation. For illustration, it could not justly be contended that the act of 1888 would be a valid exercise of legislative power as to corporations organized for the purpose of elevating grain, although invalid as to private persons conducting the same business. The conceded power of legislation over common carriers is adverse to the claim that the police power does not in any case include the power to fix the price of the use of private property and of services connected with such use, unless there is a legal monopoly or special governmental privileges or protection has been bestowed. It is said that the control which the Legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which in former times extended to the details of personal conduct and assumed to regulate the private affairs and business of men in the minutest particulars. This is true; but
84 it has survived because it was entitled to survive. By reason of the changed conditions of society and a truer appreciation

of the proper functions of government many things have fallen out of the range of the police power as formerly recognized, the regulation of which by legislation would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is to a great extent absorbed by corporations, and as a check upon the greed of these consolidated interests the legislative power of regulation is demanded by the most imperative public interests. The same principle upon which the control of common carriers rests has enabled the State to regulate in the public interest the charges of telephone and telegraph companies and to make the telephone and telegraph, those important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty—liberty regulated by law. There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the State and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds its way through the Erie canal and Hudson river to the seaboard at New York, from whence they
85 are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that in a broad sense the elevators perform the work of carriers. They are located upon or adjacent to the waters of the State and transfer from the lake vessels to the canal boats or from the canal boats to the ocean vessels the cargoes of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects. Every excessive charge made in the course of the transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation. The State of New York, in the construction of the Erie canal, exhibited its profound appreciation of the public interest involved in the encouragement of commerce. The Legislature of the State, in entering upon the work of constructing a water-way between Lake Erie and the Atlantic Ocean, sets forth in the preamble of the originating act of 1817 its reasons for that great undertaking. "It will," the preamble says, "promote agriculture, manufactures, and commerce, mitigate the calamities of war and enhance the blessings of peace, consolidate the Union, and advance the prosperity and elevate the character of the United States." In the construction and enlargement of the canal the State has expended vast sums of money raised

by taxation, and, finally, to still further promote the interests of commerce, it has made the canal a free highway and maintains it by
86 a direct tax upon the people of the State. The wise forecast and statesmanship of the projectors of this work have been amply demonstrated by experience. It has largely contributed to the power and influence of the State, promoted the prosperity of the people, and to it, more perhaps than to any other single cause, is it owing that the city of New York has become the commercial center of the Union. Whatever impairs the usefulness of the canal as a highway of commerce involves the public interest. The people of New York are greatly interested to prevent any undue exactions in the business of transportation which shall enhance the cost of the necessaries of life or force the trade in grain into channels outside of our State. In Hooker *v.* Vandewater (4 Den., 349) the court was called upon to consider the validity of an agreement between certain transportation lines on the canals to keep up the price of freights. The court held the agreement to be illegal, and Jewett, J., in pronouncing the judgment of the court, said: "That the raising of the price of freights for the transportation of merchandise or passengers upon our canals is a matter of public concern and in which the public have a deep interest does not admit of doubt. It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious if not fatal to it." The same question came up a second time in Stanton *v.* Allen (5 Den., 434) and was decided the same way. In the course of its opinion the court said: "As these canals are the property of the State, constructed at great expense, as facilities to trade and commerce and to foster and encourage agriculture, and are, at the same time, a magnificent source of revenue, whatever concerns their employment and usefulness deeply involves the
87 interest of the whole State." The fostering and protection of commerce was, even in ancient times, a favorite object of English law (Chitty on Prerogatives, 162), and this author states that the "superintendence and care of commerce, on the success of which so materially depends the wealth and prosperity of the nation, are in various cases allotted to the king by the constitution," and many governmental powers vested in the sovereign in England have, since our revolution, devolved on the Legislatures of the States. The statutes of England in earlier times were full of oppressive commercial regulations, now, happily, to a great extent abrogated; but that the interests of commerce are matters of public concern all States and governments have fully recognized. The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits is the practical monopoly which is or may be connected with its prosecution. In the city of Buffalo the elevators are located at the junction of the canal with Lake Erie. The owners of grain are compelled to use them in transferring cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive, and the circumstances afford great facility for combination among the owners of elevators to fix and maintain an exorbitant tariff of charges and to bring

into the combination any new elevator which may be erected and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination in fact exists the principle of free competition in trade is excluded. The precise object of the combination would be to prevent competition. The result of such a combination would necessarily be to subject the lake ves-
88 sels and canal boats to any exaction which the elevator owners might see fit to impose for the service of the elevator, and the elevator owners would be able to levy a tribute on the community, the extent of which would be limited only by their discretion. It is upon these various circumstances that the court is called upon to determine whether the Legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists, the court has nothing to do with the policy or wisdom of the interference in the particular case or with the question of the adequacy or inadequacy of the compensation authorized. "This court," said Chase, Ch. J., in the license-tax case (5 Wall., 469), "can know nothing of public policy except from the Constitution and the laws and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative act. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the Legislature. Questions of policy there are concluded here." Can it be said, in view of the exceptional circumstances, that the business of elevating grain is not "affected with a public interest," within the language of Lord Hale, or that the case does not fall within the principle which permits the Legislature to regulate the business of common carriers, ferrymen, innkeepers, hackmen, and the interest on the use of money? It seems to us that speculative, if not fanciful, reasons have been assigned to account for the right of legislative regulation in these and other cases. It is said that the right to regulate the charges
89 of hackmen springs from the fact that they are assigned stands in the public streets; that the Legislature may regulate the toll on ferries because the right to establish a ferry is a franchise, and therefore the business is subject to regulation; that the right to regulate wharfage rested upon the permission of the sovereign to extend wharves into the bed of navigable streams, the title to which was in the sovereign; that the right to regulate the interest on the use of money sprung from the fact that taking interest was originally illegal at common law, and that where the right was granted by statute it was taken subject to regulation by law. The plain reason, we think, why the charges of hackmen and ferrymen were made subject to public regulation is that they were common carriers. The reason assigned for the right to regulate wharfage in England overlooks the fact that the title to the bed of navigable streams was frequently vested in a subject and was his private property, subject to certain public rights, as the right of navigation, and no distinction as to the power of public regulation is suggested in the ancient books between wharves built upon the bed of navigable

waters the title to which was in the sovereign and wharves erected upon navigable streams the bed of which belonged to a subject. The obligation of the owner of the only wharf in a newly erected port to charge only reasonable wharfage is placed by Lord Hale on the ground of a virtual as distinguished from a legal monopoly. The reason assigned for the right to regulate interest takes no account of the fact that the prohibition by the ancient common law to take interest at all was a regulation, and this manifestly did not rest upon any benefit conferred on the lenders of money. It was a regulation spring-
90 ing from a supposed public interest, and was peculiarly oppressive on a certain class. A law prohibiting the taking of interest on the use of money would now be deemed a violation of a right of property; but the material point is that the prohibition as well as the regulation of interest was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereign. The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected cannot, we think, be supported. The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the Legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the State, and the practice of legislation in analogous cases. These circumstances collectively create an exceptional case and justify legislative regulation. The case of Munn *v.* Illinois has been frequently cited with approval by courts in other States (Nash *v.* Page, 80 Ky., 539; Hackett *v.* State, 105 Ind., 250; Chesapeake and Potomac Telephone Co. *v.* Baltimore and Ohio Telegraph Co., 66 Md., 399; Davis *v.* State, 68 Ala., 188). In Nash *v.* Page it was held, upon the doctrine of the Munn case, that warehousemen for
91 the public sale and purchase of tobacco in Louisville exercised a public business and assumed obligations to serve the entire public, and could not exclude persons from buying or selling tobacco in their warehouses who were not members of the board of trade. In Hackett *v.* State it was held that the relations which telephone companies have assumed towards the public imposed public obligations, and that all the instruments and appliances used by telephone companies in the prosecution of the business were, in legal contemplation, devoted to public use. In Chesapeake, etc., Tel. Co. *v.* B. and O. Tel. Co. legislation prohibiting discrimination in the business of telegraphing was upheld on the doctrine of the Munn case. The criticism to which the Munn case has been subjected has proceeded mainly on a limited and strict construction and definition of the police power. The ordinary subjects upon which it operates are well understood. It is most frequently exerted in the maintenance of public order, the protection of the public health and public morals, and in regulating mutual rights of property and the use of property

so as to prevent uses by one of his property to the injury of the property of another. These are instances of its exercise, but they do not bound the sphere of its operation. In the King case (110 N. Y., 418) it was given a much broader scope, and was held to be efficient to prevent discrimination on the ground of race and color in places opened for public entertainments. In that case the owner of the skating rink derived no special privilege or protection from the State. The public held no right in any legal sense to resort to his premises. His permission, except for the public interest involved, was revocable as to the whole commu-
92 nity or any individual citizen. But it was held that so long as he devoted his place to purposes of public entertainment he subjected it to public regulations. There is little reason under our system of government for placing a close and narrow interpretation on the police power or in restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest. Life, liberty, and property have a substantial protection against serious invasion by the Legislature in the traditions of the English-speaking race and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The Legislature may transgress the principles of the Constitution. It has done so in the past and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertance or of transient and unusual conditions in times of public excitement which have been felt and responded to in the halls of legislation. The framers of the Government wisely interposed the judicial power and invested it with the prerogative of bringing every legislative act to the test of the Constitution. But no serious invasion of constitutional guaranties by the Legislature can for a long time withstand the searching influence of public opinion, which sooner or later is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice or whatever aber-ations may have marked its course. So also in that wide range of legislative powers over
93 persons and property which lie outside of the prohibitions of the Constitution and which inhere of necessity in the very idea of government, by which persons and property may be affected without transgressing constitutional guaranties, there is a restraining and corrective power in public opinion which is a safeguard of tremendous force against unwise and impolitic legislation, hampering individual enterprise and checking the healthful stimulus of self-interest, which are the life-blood of commercial progress. The police power may be used for illegitimate ends, although no court can say that the fundamental law has been violated. There is a remedy at the polls, and it is an efficient remedy if at the bottom the legislation under it is oppressive and unjust. The remedy by taking away the power of the Legislature to act at all would in-

deed be radical and complete. But the moment the police power is destroyed or curbed by fixed and rigid rules a danger is introduced into our system which would, we think, be far greater than results from an occasional departure by the Legislature from correct principles of government. We here conclude our examination of the important question presented by this case. The division of opinion in this and other courts is evidence of the difficulty which surrounds it. But it is ever to be remembered that a statute must stand so long as any reasonable doubt can be indulged in favor of its constitutionality. We are of opinion that the statute of 1888 is constitutional as a whole, and that although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule enacted by the Legislature.

The judgment should be affirmed.

"Ruger, Ch. J.; Earl, Danforth, & Finch, JJ., concur. Gray, J., reads for reversal, & Peckham, J., concurs."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

94 THE PEOPLE, Respondent,
v.
J. TALLMAN BUDD, Appellant.

OCT. 15TH, 1889.

GRAY, *J.* (dissenting opinion):

I am unable to assent to the views expressed in the opinion for the court in this case. Judge Peckham has thoroughly examined and considered the question in People *v.* Walsh, a similar case, and I concur with him in that opinion. As his opinion exhaustively reviews the cases and the text books, I shall attempt no extended nor historical discussion, but will briefly state the grounds of my dissent.

This legislation is sought to be upheld as constitutional upon the ground that it is within a proper exercise of the sovereign power to prescribe regulations when demanded by the general welfare for the common protection of all. It is said to fall within the scope of the police power of the State. If this is true of this measure, then I fail to see where are the limits within which the exercise of that power can be confined. This act undertakes to regulate the prices which can be charged by an individual in the prosecution of his private business. Its provisions are attempted to be justified in this case because it is said the business in question is a virtual monopoly; owes its profitable existence to the benefit conferred by the Erie canal; and the interests of trade and commerce and the wel-
95 fare of the State demand that its charges should be regulated by the sovereign power. This plea for the extension of the police power to the extent named, of interfering with the conduct of a legitimate private business enterprise, seems to me to find no

support in reason, and it certainly tends to nullify that provision of the Constitution which is supposed to guarantee to each individual that he shall not be deprived of his life or liberty or property without due process of law.

The learned judge, writing the opinion, concedes that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subjects of legislative regulation. He well says that "these are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived." He believes, however, that he finds in this particular business of elevating grain "special conditions and circumstances" which justify legislative control. In my view, the concession which the learned judge is obliged to make with respect to our constitutional liberties impairs the force and effect of his opinion unless he is able to show that the business in question is affected with a public use or interest within the strict and proper meaning of the term. This I do not see that he accomplishes. The circumstances amount to nothing more than that the transshipment of grain from and to barges, vessels, and cars is more expeditiously and advantageously
96 done through the use of grain elevators than in any other way, and those persons who are interested in the shipment of grain must, for the better promotion of their private interests, have resort to them. It may be admitted that the use of the grain elevator is necessary to the grain shipper for the profitable or successful transaction of his business. But do such facts invest the grain-elevating business, which the individual carries on, with such a public character as to give the public the right to regulate the charges which the owner may make? If the question affected a corporation deriving its franchises and powers from the State a different case would be presented; but here we have the case of an individual conducting his private business in a legitimate manner and owing nothing to the State for privileges or powers or assistance conferred. He exercises the right, common to all, of engaging in a legitimate business for his own profit and gain.

I understand it to be the general rule that the individual has absolute liberty to pursue his avocations and to contract with respect to his property, subject only to the restriction that he may not interfere therein with his neighbor's rights or use of property. He is bound to use his own property so as not to injure his neighbor's. That liberty I take to be guaranteed by the Constitution to him and to be a most valuable right. What force or reason has the suggestion that the business of the individual sustains some im-
97 portant relation to a branch of trade in which other persons are largely engaged, and that it is therefore public in its nature, and therefore it should become the subject of legislative control as to charges? Is it because those other persons complain of the charges and allege that the business as managed by those engaged in it is virtually a monopoly? Has — Government any concern or interest in the price which one individual may demand

of another who resorts to him because of his superior business skill or facilities? How does the magnitude or the publicity of an individual's business furnish a valid reason for legislative interference? Every business is, in a measure, public, and is dependent upon public patronage for its maintenance and success. It is not compulsory upon the public to resort to these elevators, nor is the business exclusive or beyond competition. There is a very wide distinction between those cases which are referred to in the books and which Lord Ellenborough speaks of (12 East., 539), where the public have a right to resort to the premises of the individual and to make use of them, and that individual has a monopoly in them for that purpose, and the case of an individual prosecuting his own business upon his own premises by no leave, privilege, or franchise of the sovereign power. Here it is a matter of option or, rather, of agreement with the owner whether his premises may be resorted to and his property used by other persons. The public have no independent legal right to make use of them.

98 I believe the constitutional rights of the individual are directly attacked by this legislation. Under the pretence that his business has, by its magnitude and situation, become invested with a public interest, it is claimed to be brought within the right of the Government to regulate. Where is the limit to the exercise of sovereign power if such a pretext is considered a justification? Of what use are our vaunted constitutional guarantees if we may be deprived of property rights on so flimsy a pretext? It is said that the remedy for such oppressive and unjust legislation is to be found at the polls. I do not think that to be the only resort of the citizen. The constitutional guarantees were provided for and are enforceable by him for his protection.

I cannot believe that the theory or the frame of our form of government involved the idea that so great a power should be lodged in the Legislature.

If the door is opened to this species of legislation what protection have we against socialistic laws? What is to prevent subsequent legislatures from interfering with any other kind of private enterprise if, from improved methods in its conduct and for peculiar reasons, it appears to the legislative body to virtually monopolize that branch of business, and that the owner takes advantage of his diligence or superior skill and advantages to demand what to them seems an apparently high or even excessive price in his labor or property of those who resort to him? The Legislature, in effect, says

99 to the individual, when interfering to regulate the charges he may make in his business, It is true you are a private individual engaged in a private and legitimate business, in the prosecution of which you are authorized and protected by the Constitution; but, nevertheless, we think, in the public interest, because your business has become so advantageous and so necessary to a large portion of the public because of its superior facilities, that you shall not be allowed to pursue it unless you reduce your charges to a rate fixed by us. As well may the Legislature claim a right to interfere to reduce and regulate the charges which a combination of manu-

facturers have fixed for a certain line of goods. It seems to me that the theory of such legislation is a startling departure from the true conception of governmental functions. They should work to protect and develope private rights and to secure to all individuals the uniform operation of the constitutional guarantees. The police power is incapable of being stretched to reach such a case as this, if we have any respect for the provisions of the Constitution. That power is properly exercised in the preservation of the private rights of individuals, in the maintenance of public order, in the supervision of public health and morals, and in the prevention of a conflict of rights. Its justification for interference with a private legitimate business is admissible only when that business may be said to be affected by a public use or interest by reason of some aid, grant, or privilege conferred by the State. Judge Cooley says, in
100 his valuable work on Constitutional Limitations (p. 739): "The mere fact that the public have an interest in the existence of the business and are accommodated by it cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation."

This act, in my opinion, was an unconstitutional exercise of power by the Legislature. Such legislation was not demanded by the general welfare, and it violates the social compact under which we live. It is a subversion of the constitutional guarantee. It is against such legislation that the constitutional guaranty was framed, and that the judicial power was intended by the Constitution to afford protection to the individual.

I think the judgment should be reversed and the appellant discharged.

"Peckham, J., concurs."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

101 [Endorsed:] People *vs.* Budd. Opinion (dissenting). Gray, J.

102 "Orders affirmed on opinion in People *v.* Budd. Ruger, Ch. J.; Andrews, Earl, Danforth, & Finch, JJ., concur. Peckham, J., reads for reversal; Gray, J., concurs."

In the Court of Appeals of the State of New York.

THE PEOPLE *ex Rel.* EDWARD ANNAN, Appellant,
against
ANDREW WALSH, Police Justice of the City of Brooklyn, and CLARK D. RHINEHART, Sheriff of the County of Kings, Respondents.

THE PEOPLE *ex Rel.* F. E. PINTO, Appellant,
against
THE SAME, Respondents.

PECKHAM, *J.* (dissenting):

The Federal Supreme Court has decided that a statute of the State of Illinois, which is somewhat similar to the one under consideration here, was a valid law, so far as the Federal Constitution was concerned, and that it violated no right, privilege, or immunity protected by that instrument.

A clause exists in the constitution of this State which is similar to one of those in the Federal Constitution, under which the claim of invalidity was made and denied as to the Illinois statute. The case of Munn *v.* Illinois (94 U. S., 113) establishes the point that the Illinois statute there under discussion, as applied to the particular facts of that case, did not violate any provision of the Federal Constitution nor infringe upon any privilege or immunity protected by it.

The facts in these New York cases differ considerably, in certain particulars, from those in the Munn case; and if the princi-
103 ples decided in that case were upheld it might still become of the greatest importance to distinguish these differences and to discuss and decide upon their materiality as applicable to the question of the subjection of the defendants to the provisions of this act; but the question which arises *in limine* is based upon the assumption that the cases are substantially alike in their facts, and the question is this: In construing a clause in our State constitution similar to one in the Federal instrument should we follow the interpretation of such clause as given by the Federal court, which interpretation compels us to deny to these defendants the relief they ask for, although otherwise we are satisfied that they are justly entitled to that relief?

If any right, privilege, or immunity claimed under the Federal Constitution or laws be denied by this court its decision is reviewable in the supreme court, and in such cases it is our duty to follow in the footsteps of that court and to be guided and controlled by its decisions; but in this case the right is claimed under our State constitution, and in matters pertaining to its proper construction our decision is final, excepting that if, as construed by us, the constitution or our laws deny the existence of some right or privilege claimed by a party by virtue of the Federal Constitution or laws, our decision is reviewable by the Federal court not for the purpose of reviewing our construction of our own constitution or laws, but to see whether, under the constitution or laws as construed by us, any

right or privilege existing by virtue of the Federal Constitution or laws has been violated or denied, and, if so, to give it effect, notwithstanding the State law or constitution; but where we deny no right or privilege claimed, and, on the contrary, assert and protect it, there is no review by the Federal court possible.

When the privilege or immunity is claimed under our State constitution and we believe that it is rightfully and legally claimed, although the claim rests upon a clause which is similar to the one in the Federal instrument, under which it has been denied by
104 the Federal court, nevertheless we ought, as we think, to give expression to our own judgment, under the sanction of our official duty, to declare the law as we believe it to exist, notwithstanding we differ with the conclusions arrived at by the Federal court. In so doing we decide against no right, privilege, or immunity claimed under the Federal Constitution or laws; but, as a State court, we decide in a matter over which we have full jurisdiction, upon the proper construction to be given to the fundamental law of the State. We therefore proceed to give our views on the subject-matter involved in these appeals.

It is, perhaps, needless to inaugurate the discussion of the question by an expression of the very great respect we feel for the Federal Supreme Court and for each of its distinguished and learned members, and yet in doing so we but give voice to the sentiments which, as we believe, possess judges and citizens alike throughout the land. It is only in the performance of our official duty that we venture to differ from that court regarding matters which we are bound to decide, and when there is an equal obligation to decide them in accordance with our own deliberate views.

The case of Munn *v.* Illinois (94 U. S., 113) has been referred to, in our court but sparingly, as there has not been very frequent occasion for such reference.

It was referred to in Bertholf *v.* O'Reilly (74 N. Y., 509), Boardman *v.* Lake Shore and Michigan Southern Railway Company (84 *id.*, 157, 186), People *v.* King (110 *id.*, 418, at 424, 428), and in Buffalo East Side Railroad Company *v.* Buffalo Street Railroad Company (111 *id.*, 132). These are the only cases I have observed, although there may be others which have escaped my attention.

In Bertholf *v.* O'Reilly (74 N. Y., 509) it was decided that the Legislature has power to create a cause of action for damages in favor of one who is injured in person or property by the act of an intoxicated person against the owner of real property, whose only connection with the injury is that he leased the premises where
105 the liquor causing the intoxication was sold or given away with knowledge that intoxicating liquors were to be sold thereon.

In speaking of the police power, Andrews, J., in above case, cited The Slaughter-House Cases (16 Wall., 36) and Munn *v.* Illinois to show how far courts have gone in upholding legislation affecting private rights and property as a due exercise of the police power residing within the State. He said those "cases may perhaps be deemed to have carried the right of legislative interference with

private rights and property to its utmost limit, but they illustrate the scope of the police power in legislation."

The legislation in question in the Bertholf case was placed upon the right of the Legislature to control the use and traffic in intoxicating liquors, and its authority to impose liabilities upon those who exercise the traffic or who sell or give away intoxicating drinks for consequential injuries to others, the court said follows as a necessary incident. Such right of legislation as to the prohibition or regulation of the sale, etc., of intoxicating liquors comes within the narrowest definition of the police power, and is substantially denied by no one.

In the Bertholf case there was nothing which called for the approval or affirmance of the case of Munn or the very broad principle asserted in and underlying that case. It was referred to, as stated in his opinion by Andrews, J., for the simple purpose of showing to what extent some courts had gone, and it was stated to be one where the right had been carried to its utmost limit, but the limit itself was neither approved or disapproved. Nothing in Boardman *v.* Lake Shore, etc., Company (84 N. Y., 157, 186) is material upon the question. It was simply stated that the Munn case did not bear out the contention for which it was cited by the appellant.

In People *v.* King (110 N. Y., 418, 424, 428) the question was whether the law securing to colored persons the right to admission on equal terms with others to public resorts and to equal enjoyment of privileges of a quasi-public character was a valid law as applied to defendant's place of amusement. It was held so to be.

106 The police power, it is acknowledged, may be rightfully exercised, among others, in cases involving the public health or the public morals. No one questions it in regard to either of those two important branches of government. The extent of its proper exercise in such cases is open, however, to some differences of opinion. The place of amusement of King was held to be so far public with reference to this specific power as to permit of its exercise, and the very point of the decision was that the public had this right of resort to plaintiff's premises by his own dedication, even including colored persons, upon payment of the prescribed fee.

Judge Cooley supports the legality of laws regulating places for public amusement, such as theaters, etc., upon the ground that they are properly the subject of police regulation, as they are generally licensed by the State or municipality wherein they exist. (See Cooley on Torts, 285.) But I have failed to observe any statute in this State which attempts to limit the price which a theatrical manager shall be allowed to charge for admission to his entertainments. Proper police regulation and inspection, to the end that peace and good order may be obtained and public morals reasonably protected, is one thing, while a power to limit compensation is another and far greater and more dangerous power, and the two powers are not necessarily coexistent. The latter power is not only a dangerous one, but it is not called for by the same principles which permit, and, indeed, demand the exercise of the former under a general

right to regulate the manner, within reasonable rules, in which a man shall use his property so as not to improperly interfere with the proper enjoyment by his neighbor of his own property, or so as not to injure the public health or morals, and in order that proper safeguards may be observed for escape in times of fire.

In the King case Judge Andrews said: "The principle stated by Waite, Ch. J., in Munn *v.* Illinois, which received the assent of a majority of the court, applies in this case," the principle being that where one devotes his property to a use in which the public
107 have an interest, he, in effect, grants to the public an interest in such use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. There was nothing in the case in this court which affirmed the correctness of the doctrines of the Munn case as applied to the facts upon which the decision in that case was based.

In Buffalo East Side Railway Company *v.* Buffalo Street Railway Company (*supra*) both parties were corporations. Ruger, Ch. J., said: It was unnecessary to discuss the proposition with much fullness, as it was conceded by the appellant that the authority of the Legislature, in the exercise of the police power, could not be limited by provisions in contracts between individuals or corporations, and the contract between the parties as to the rate of fare was held subordinate to the legislative power to regulate the fair to be charged by the corporations.

The Munn case proceeded upon the principle that the parties had devoted their property to a public use, because the productions of "seven or eight great States of the West" had to pass through their elevators for transhipment into vessels on their way to "four or five States on the sea shore," and that thus they had a "virtual" monopoly of that business, which created a right on the part of the State to regulate or limit the amount of their compensation for such use. It was placed on the theory of an implied grant on the part of the owners of such property to the public to thus limit the compensation, and such grant was implied because the property was thus devoted by the owners to a public use.

Two factors seem to have entered into the proposition as developed by the court, one of which was the extent of the business, and the other that in its performance there was a "virtual" monopoly. The combination of extent of user and so-called virtual monopoly seems, in the mind of the court, to have had the effect of clothing the property with this public interest, and hence to have imposed upon its owners the necessity of submitting to the limitation of their compensation. It has never been carried to any such extent
108 in this State. Various instances of the application of these principles were cited by way of illustration, and it was asserted that no new principle of the law was created, but simply an application of an old principle to a new and different state of facts.

The learned chief justice, who delivered the opinion of a majority of the court, after citing these instances, thus continued: "Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the inn-keeper, or the

wharfinger, or the baker, or the cartman, or the hackney coachman pursues a public employment and exercises a sort of public office, these plaintiffs in error do not. Therefore it was held that the business done by the owners of the elevators or warehouses was such as to clothe their property thus used with a public interest, and it ceased to be *juris privati* only.

I have examined with very great care and attention the various authorities cited by the court as illustrations of the principle laid down, and with great diffidence I am compelled to say, as the result of such examination, that it seems to me they do not justify the application of the principle to the case then before the court. (See Tiedeman on Limitations of the Police Power, 230.) If it be assumed that when one devotes or dedicates his property to a public use the public then has an interest in such use, and that therefore his compensation may be limited by law, still I deny that such devotion or dedication is made merely because the owner has embarked his property in a business in which large numbers of the public are interested in its use; and I also deny that any such person has a virtual or any monopoly in the business, without a grant thereof from the sovereign power, merely because the property is conveniently situated for the business and it would cost a large amount of money to duplicate it. So long as every one is free to go into the same business and invest his capital therein with the same rights and privileges as those who are already engaged in it, there can be no monopoly, in the legal acceptation of that term, virtual or otherwise.

109 I contend that within the subject now under review the meaning of the phrase "devoting one's property to a public use," as evidenced in the cases cited by the learned chief justice and also in other cases in this State, is that such devotion or dedication is made when by reason of it the public thereafter have a legal right to resort to the property and to use it for a reasonable compensation or for such as the law provides, or else where some privilege or right is granted by the Government, in which case the right of limitation is based upon and is really a part consideration for the grant.

In the one case the legal right to resort to and use the property by the public so long as the owner chooses to remain in the business springs from this dedication, and it is the criterion that is to decide the question whether the property has or has not been thus dedicated; and this right does not spring into existence merely because the business is such as interests a great number of the public, or because it is of large extent, or because there is no other property at that place which is or conveniently may be devoted to the same kind of business, while in the other case the right of limitation exists because some privilege or franchise has been granted to the owner by the sovereign power, an acceptance of which carries with it the burden of submitting to the demand for the service. As has been said, the right to regulate places of public amusement, such as theaters and the like, comes from another branch of the police power, and, as I believe, does not extend to the power to limit prices. The right to make use of the owner's property by reason of

a dedication has been held to have been created in the exceptional cases of a common carrier, the keeper of a common inn, and a common or public wharfinger, and perhaps in some others. These are exceptional cases, for they trench upon the well-grounded principle that no man can be compelled to enter into business relations with another unless the party carrying on the business shall have received some privilege, right, or franchise from the sovereign power, when such compulsion may be annexed to the grant. The principle should not be
110 extended. To include within its grasp the case of a warehouseman who has no privilege from the sovereign power, but simply builds his warehouse on the shores of a navigable stream and upon his own property, would be to overturn cases adjudged in this court and regarded as the law for many years past. The same is true of the owner of an elevator, who receives nothing from the State. (See Wetmore *v.* Atlantic White Lead Co., 37 Barb., 70; Wetmore *v.* Brooklyn Gas Light Co., 42 N. Y., 384.) In most of the cases cited by the court in the Munn case the right of limitation springs from a license or privilege awarded by the Government, and this right of regulation or limitation is engrafted on or inheres in such license as a condition of the exercise of such privilege. Thus hackmen and cartmen have the privilege to stand in the public streets in exercising their calling, and the public has the right, in return for such license, to demand their services on tender of proper compensation. The same is true as to ferries, which are but parts of the highway (Mayor *v.* Starin, 106 N. Y., 1), and the right to establish them rested exclusively in the crown or, in this country, in the people. Consequently, when established in that way, the right of regulating or limiting the tolls remained in the sovereignty granting the license, and was exercised accordingly.

The ancient right to regulate the toll which millers should charge rested on the right, at common law, which the lord of the manor had to compel all his tenants to grind their corn at his mill, and no one could set up a mill but by his license or that of the crown, and with such license went the right of regulation as to the tolls to be received. (See Cooley on Constitutional Limitations, 735; 15 Viner's Abr., 398, 399.) As to the interest on money and the right to regulate it, it was by the common law prohibited to any one to take any interest for the use of money, and, subsequently, when Parliament altered the common law, it simply allowed interest to be taken up to a certain percentage and upon certain terms. (Tiedeman on Limitations of Police Power, § 94.) All the instances above
111 cited are commented on in the very able dissenting opinion of Mr. Justice Field in the Munn case (concurred in by Mr. Justice Strong), and the same reasons for the exercise of the power to regulate these different branches of business are therein stated in a much more full and complete way than I have done.

As is said, there can be no legal objection to the power to direct the weight of a loaf of bread, for that is a mere police regulation, interfering with no man's real liberty, and it is the same as if the length of a yard were declared by law or the weight of a ton; but I

deny the right of any Legislature in this country to limit the price for which an individual baker shall sell his bread per loaf or the price per ton for which a coal dealer shall sell his coal or the price which a tailor shall charge for his coat or the shoemaker for his shoes. A common carrier exercises, it has been stated, a kind of public office, and when a man devotes himself to such a calling and holds himself out to the public as a common carrier he thereby grants to the public such an interest in his business that each individual has the legal right to demand the carriage of his property by the carrier upon payment or tender of a reasonable compensation for carriage in the absence of a legal regulation thereof. (Allen *v.* Sackender, 37 N. Y., 341.) He thus becomes a common carrier because of this dedication to the general public, and this legal right of the public to demand this service springs from such dedication. The same is true of a public wharfinger or the keeper of a common inn. They were all called "common" in their several occupations, and were common because they held themselves out as such to the public, and, as was said in some of the old books, entered into a general contract with the whole public to do the work, and hence arose the right of the public to call upon them to fulfill this contract. No such right of access to the premises of defendants exists, and no such right to demand the use of their property can be or, as I understand, is pretended; but unless the innkeeper was the keeper of a common inn, or the carrier a common one, or the wharfinger was a public one, no matter what the extent of their business
112 or how large a number of the public were entertained by them, as the public had no right of resort to their premises or to demand transportation for or the care of their goods or entertainment at their house, the right of regulation did not exist as to the compensation they should receive. The cases are, as has been said, exceptions to the general rule that no man can be compelled to have business relations with another. (See Tiedeman on Limitations of Police Power, § 92, p. 226.)

There is no satisfactory ground, in my judgment, upon which the power may be based to regulate or limit the price of transportation by a comman carrier or the price of entertainment by an innkeeper, who is a private individual and who has received no privileges from the State of any kind. To say that the carrier (while a private individual) holds a kind of public office, and therefore his prices should be limited, is not, as it seems to me, a very accurate description of his attitude to the public. He holds no office, public or private, within any fair meaning of such word, and there is no reason, in justice or common sense, why his compensation should be limited by law, which would not hold good in the case of every individual dealing with the public and holding himself out as ready, willing, and eager to sell his goods to all comers.

The rule as to private individuals who happened to be common carriers or innkeepers, etc., was established in the earlier days of the law, and it was regarded by Lord Hale as most proper that individuals who followed such callings should be placed under State supervision and control. The habits, customs, and general intelli-

gence of the people of those days were far different from those of to-day; and laws which might possibly be pardoned on account of ignorance, sparseness of population, difficulties of communication, and rural and unsettled habits of life can have no such justification in our times.

It must be constantly borne in mind that in those days the theory of a paternal government, which was to watch over and protect the individual at every moment, to dictate the quality of his
113 food, and the character of his clothes, his hours of labor, the amount of his wages, his attendance upon church, and generally to care for him in his private life, was almost at its height.

The famous statute of the fifth of Elizabeth, chapter 4, concerning laborers, was in full force when Lord Hale wrote. (Lecky's England in Eighteenth Century, vol. 6, p. 233.) That statute assumed to regulate the existence and determine the numbers of the artisans in the whole country. It provided how long one should work as an apprentice, how many there should be in proportion to journeymen, where they should live, under what circumstances move to another neighborhood, how many hours they should labor, and for how long a time a journeymen should be employed; and, finally, it provided that wages should be assessed for the year by the justices of the peace, who were also directed to settle all disputes between masters and apprentices. By an act of the first of James I, chapter 6, the above act was extended by giving to the justices power to fix the wages, not only of journeymen and apprentices, but of all kinds of laborers and workmen.

During this time also there were statutes making it a felony to export wool from England, and the exporter of sheep, rams, or lambs was liable to imprisonment, the forfeiture of all his property, and to have his left hand cut off for first offense, and for the second offense to be adjudged a felon and to suffer death accordingly. (See 8 Eliz., ch. 3; 13 and 14 Chas. 2, chap. 18.) Provisions were extant forbidding exportation of hides, raw or tanned leather, and many other things, and all for the supposed benefit of the kingdom or the various interests in whose favor the legislation was enacted. (Smith's Wealth of Nations, by McCulloch, p. 292 *et seq.*) Laws were then in force which regulated down to the minutest detail the manner of life, and the texture of the dress and the costliness thereof, and the variety of dishes upon the tables of the people. Special laws determined how much land of an estate should be plowed and how much left in pasture; how much was to surround a laborer's
114 cottage; how many sheep should be supported on a farm. (England in the Eighteenth Century, Lecky, vol. 6, p. 231 *et seq.*)

In speaking of the above-mentioned statute of Elizabeth the late Mr. W. Stanley Jevons in his little work on "The State in Relation to Labour," in the English Citizen Series (at page 34), says that it was a monstrous law, and that, according to the opinion of historians, it represented the triumph of the craft guilds—that is, the medieval trade unions—and that in operation it was, there is reason to believe, little more than a dead letter. In the same work the author

says that the justification of State interference in matters of private concern, as in the inspection of certain kinds of food, etc., lies in the fact that government may properly interfere to prevent abuses in those special cases where it is impossible, or at least difficult, for the buyer of goods to verify their character for himself. Inspection of factories is justifiable for the purpose of thereby protecting the health and morals of large masses of the people who labor in them, and who, as experience has shown, are unable to protect themselves. The work is a most able treatment of the question as to how far it is proper to interfere in the general industrial department of the country. It is needless to say that such a law as is under consideration here does not fall under any of the conditions in which State interference is regarded as proper.

But it was during the times when laws such as I have above alluded to were in force that Lord Hale lived and wrote. He was, without doubt, a very great lawyer, but he wrote regarding the law as it then existed and when views of governmental interference with the private concerns of individuals were carried to the greatest extent, and he was naturally and necessarily affected by the atmosphere of the times in which he lived, and his views as to the policy and propriety of laws involving an interference with the private concerns of the subject were, of course, colored by the general ideas as to the proper function of government then existing. This great magistrate, it will be remembered, was a firm believer in the existence of witchcraft, and presided at the trials of old women
115 accused of such crime and condemned them to death on conviction thereof. I do not mention this as any evidence against the ability, integrity, or learning of this upright man and able lawyer; but it is entirely conclusive of the truth of the statement that all men, however great and however honest, are almost necessarily affected by the general belief of their times, and that Lord Hale was not one of the few exceptions to this rule. I have spoken thus somewhat at length upon this subject, not for the purpose of attempting to show the incorrectness of the rule laid down by Lord Hale regarding common carriers, innkepers, wharfingers, etc., who were at the same time nothing but private individuals having no privilege from the State, but I have thus spoken for the purpose of showing that, because the rule is correctly stated in those cases, no reason exists in such fact for the extension of the principle of that rule to other cases, and by doing so go back to the seventeenth or eighteenth century ideas of paternal government, and thereby wholly ignore the later and, as we firmly believe, the more correct ideas which an increase of civilization and a fuller knowledge of the fundamental laws of political economy and a truer conception of the proper functions of government have given us at the present day. Rights which we would now regard as secured to us by our bill of rights against all assaults, from whatever quarter, were in those days regarded as the proper subjects of legislative interference and suppression. The fact that certain rules of the common law have come down to us unimpaired, although based upon a view of the relations of government to the people which obtained

in the seventeenth century, should certainly furnish no reason for extending those rules to cases which, but for such extension, would be regarded as clearly within the protection of the constitutional limitations contained in our bill of rights. I think that no further violation of the general rule of absolute liberty of the individual to contract regarding his own property should be sustained by this court. This violation would have to occur if we should hold legislation of the kind under consideration valid.

116 Tiedman, in his work already cited, at the end of section 93, on page 238, in speaking of Lord Hale and his observations and generally in regard to this power, says: "Lord Hale, therefore, cannot be cited in support of the doctrine that the State may regulate the prices charged in a business which, from the circumstances, becomes a virtual monopoly; and even if he did justify such regulations his opinions can hardly be set up in opposition to the rational prohibitionists of the American Constitution. By all the known rules of constitutional construction the conclusion must be reached that the regulation of prices in such a case is unconstitutional; and while the common law is still authority for the propriety and justification of laws which antedate the American Constitution it cannot be cited to defeat the plain meaning of the Constitution in respect to laws subsequently enacted." (See, also, same author, p. 588.)

Judge Cooley, in his Constitutional Limitations (5th ed.), at page 739, gives four heads under which such regulations are admissible, and such a case as this comes under none of them. He says, in summarizing his own views as to when the property of the citizen could be said to be affected with a public use or interest so that prices might be limited, that they were in four classes: (1.) When the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise, and under this head he includes such cases as lotteries, giving shows, keeping billiard tables for hire, etc. (2.) Where the State, on public grounds, renders to the business special assistance by taxation or otherwise. (3.) Where, for the accommodation of business, some special use is allowed to be made of public property or of a public easement. (4.) Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly, he says, there may be other cases. He does not include such a case as this or the Munn case, though the latter was under criticism in this very definition.

That learned author, in speaking on this same subject, says, in same volume, pages 737, 738, 739: "What circumstances shall

117 affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business and are accommodated by it cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices. If one is permitted to take upon himself a public employment with

special privileges which only the State can confer on him the case is clear enough," etc.

The case put by Lord Hale of the owner of a private wharf, which was the only one in a new port, being properly subjected to a limitation of his charges, because of an alleged monopoly, is spoken of by Cooley and explained as grounded upon the use of public property under a license, as the title to the soil under the water in navigable streams is in the sovereign, and its use by a private person upon which to build a wharf is under the license of the crown.

Judge Cooley then says, at page 739 of his Constitutional Limitations, as follows: "If, then, by public permission one is making use of the public property, and he claims to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable that his business is affected with a public interest which requires him to deal with the public on reasonable terms."

The right arises from the use of the property of the public by the license of the public or, in other words, by the license of the crown, and thus the right of limitation attaches to such user. It does not spring from any assumed monopoly arising simply from convenience of location or because no others are engaged in the business, but only because of the user of public property by the license of the crown or the people.

There is not the slightest proof in this case that the warehouse is built below low-water mark in the East river, on the Brook-
118 lyn side, and so on land the title to which may be in the State. If it be thus built, then perhaps the State could compel its removal, but it has done or attempted nothing of the kind, and does not seek to do it by this legislation, nor is there any pretense of the limitation of price being placed as a condition of the continued user of the land by the owner of the warehouse. There is no grant of any right by the State nor of any privilege or franchise upon which to base a claim of the power to limit the price for the user of the warehouse.

Both these able writers whom I have quoted are plainly of the opinion that the Munn case cannot be upheld as within any branch of the police power, as that power is limited under our constitutional government; and I think that, notwithstanding the great respect which is entertained for the Federal Supreme Court, the doctrines of the Munn case have never received the unqualified approval of the profession. I think, in order to follow it in these cases, we should have to overturn cases and principles decided in this State after mature deliberation and upon the most impregnable grounds.

The Munn case was published in 16 American Law Register (N. S.), 526, in 1877. A note is added, at the end of the report, which is entirely adverse to the doctrines of the case, and it is stated that no other court had ever held that a warehouse situated as was that of the plaintiff in error in that case was private property which was affected with a public use. A private individual's property was supposed to be affected by a public use, as stated in the note above referred to, when the public had a somewhat greater or less proprietary right

therein, as in a public stream over which a person established a ferry, or in the right to a fishery, etc.; and the right to regulate the business of a common carrier, it was thought, might be placed on the ground of the use the carrier made of a public highway maintained more or less directly by the taxation of the public.

Commenting on the Munn case, it is said, in 2 Hare's American Constitutional Law, 771: "Such legislation may be eminently just as regards companies which have been chartered by the State
119 or clothed with the power of eminent domain, because grants of this description not infrequently preclude the competition, which is the security against overcharge in trade, but seems questionable when the way is left open to individual enterprise," etc.

There is some evidence, also, that the decision in the Munn case has not been accepted without criticism by lawyers, even in the land from which we derive our common law, upon the principles of which the learned Chief Justice claimed to rest it. Mr. Bryce, one of the most accomplished of English lawyers and statesmen and the author of the late great work on "The American Commonwealth," thinks that the decision was, perhaps, more the effect of public opinion in its action upon the court than of a strict adherence to legal principles, and while, as he says, not presuming to question its correctness, yet adds that it evidently represents a different view of the sacredness of private rights and of the powers of the Legislature from that entertained by Chief Justice Marshall and his associates. (See 1 Bryce's American Commonwealth, 2 vol. ed., p. 267; 3 vol. ed., p. 365.)

Upon the question of what is meant by the expressions public use and virtual monopoly, when found in the cases upon the subject under consideration, that of Aldnutt *v.* Inglis, as treasurer, etc., of London Dock Company (12 East., 527), is a most instructive one. The defendants were the owners of certain London docks, and they had received from Parliament the right to store foreign wines in their warehouses connected with such docks in bond until their sale and the payment of duties thereon. This license was at that time exclusive, as none but the owners of these docks had the right to receive the wines on storage. This gave the importers of such wines the legal right to resort to the docks and warehouses for unloading and storing, and hence the court held that their owners had devoted them to a public use. The court said that "if the crown should thereafter think it advisable to extend the privilege" (of warehousing these foreign wines in bond) "more generally to other persons and places, so far as that the public will not be restrained
120 from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly," etc.; and Ellenborough, Ch. J., said there is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purposes. If he will take the benefit of that monopoly he must, as an equivalent, perform the

duty attached to it on reasonable terms. It is seen that this was a case where Parliament, in the first place, granted a monopoly, and, as a consequence of an acceptance thereof by defendants, the public had a right to resort to the warehouse for the purpose of storing the wines in bond; and by thus accepting the monopoly the defendants dedicated their property to a quasi-public use, because the public, by virtue of such monopoly and for such purpose, had the right to resort to their warehouses and to demand the storage of the wines.

The facts of the case must be taken into account whenever expressions are used of a somewhat general nature; and it is evident that when the English judges and courts spoke of an owner of property devoting it to a public use or one in which the public had an interest they meant that by reason of such devotion the public thereafter had a right to resort to the place where the property was and a legal right to demand its use on payment of a reasonable compensation; and the cases they were discussing and in which they made use of the term "virtual monopoly" and where they held the owners had devoted their property to a public use were cases where such owners were receiving from the government some special privilege or franchise by accepting which they did thereby so devote their property. Unless the public had that right of resort and that right of user upon payment of such compensation there was no devotion of the property to a public use within the meaning of this expression, which, *ex vi termini*, means a devotion to the pub-
121 lic use to such an extent that the public thereby has a legal right to resort to the premises and to demand such use upon payment or tender of reasonable compensation.

The case of Bolt *v.* Stanett (8 Durnf. & East., 606) is an illustration of the same principle. The crane was set up by its owners on a public quay (either by the express or implied license of the government), to which the public had the right to resort for the purpose of loading and unloading vessels, and, being so set up and under such circumstances that the public had the right to make use of it, the compensation therefor was properly limited to a reasonable sum.

In this State neither the amount of work done by the owner for the public in the use of his property, nor the numbers of the public who use it, nor the convenience of situation of the property, nor all combined, make the use a public one within the meaning of the term as used in this discussion. Where the owner of property holds himself out to the public as the common servitor thereof, as in the case of a common carrier or innkeeper or wharfinger (which, as I have said, are ancient exceptions to the general rule), or where he has received some privilege or franchise from the Government, then he has granted to the public an interest in his property as to its use or he accepts the privilege or franchise upon such conditions as the Government may annex to its exercise; and when he opens his premises to and invites the public generally to repair to them for the purpose of a resort for some kind of public entertainment or amusement, then he, for the time being at least, brings such property within the exercise of the police power as applied to regulations for the public health or morals, as in the late case of People *v.*

King in this court (110 N. Y., 418), already cited. Even the law referred to in the King case made no provision as to the amount of compensation to be demanded for entrance to the premises.

The decision in the Munn case entirely changed the common-law character of the warehouses or elevators and transformed the business from a private to a public one, and this transforma-
122 tion was held to have taken place simply because of the extent of the user of the property and the convenience of situation. The change being effected, the right to demand the services of the plaintiffs in error was assumed without argument, and, such right existing, the right to limit the change was evolved therefrom. The fact that the owners of the property had received no license or privilege from the State, had been endowed with no legal monopoly, virtual or otherwise, were neither common carriers nor public wharfingers, and were simply using their private property in a business which in its real nature was as strictly private as that of the large houses of A. T. Stewart, Claflin & Co., and hundreds of other large firms in New York and elsewhere, had no effect with the court in determining this question of public use. The business was placed on the same foundation as a common carrier, and the right of the public to compel business relations was assumed. I am confident that the courts of this State have never gone to any such length in determining when property is devoted or dedicated to a public use.

What is alluded to in the books as a monopoly or as a "virtual" monopoly is, in either case, a right created by license from the crown or by virtue of an act of Parliament. (See 4 Bl. Com., 159; 4 Stephens' Com., 291.) The important fact is that it emanates from the sovereign power either by license or by legislation, and in both cases, either as an exclusive or a virtual monopoly, it is a privilege or immunity granted to an individual or corporation, and, of course, upon such conditions as to compensation, etc., as the licensing power may choose to impose. Thus in the case in 12 East (*supra*) it was stated that the dock owners would have had a virtual monopoly of the storage business if the choice of the public as to where to store its wines were so far restricted by the Government licensing only a few that its freedom of choice practically did not exist; but that if the license should so far become general that there was practically a fair freedom of choice, then there would be no monopoly, and the owners of the warehouses would be free to charge such rates as might be agreed upon.

123 It was nowhere stated or implied that there could be an exclusive or a virtual monopoly grounded on the fact of convenience of situation or the costliness of the erections or a mere combination of owners to raise prices. Such combinations might be illegal, and they might subject the persons who entered into them to prosecution as violators of the law, but that would confer no right to regulate or limit the amount of compensation which a private individual might charge for the use of his property where he had not devoted it to a public use, as I understand the meaning of that term, and where he had not received any privilege or immunity

from the State, upon the exercise of which the right of limitation might be imposed. The virtual monopoly in the case in East rested wholly upon the grant of the privilege of bonding given by the crown.

Finally, and much later than the Munn case, the Supreme Court, in defining just what it did decide in that case, said (per Mr. Justice Miller) that the Munn case presented the question whether one engaged in a public business in which all the public had a right to require his service could be regulated by acts of the Legislature in the exercise of this public function and public duty so far as to limit the amount of charges that should be made for such services, and the court answered such question in the affirmative. (See Wabash R. R. Co. *v.* Illinois, 118 U. S., 557, 569.) The court seems, therefore, to have assumed in the later case that the Chicago elevator owners were bound to place their elevators at the service of the public upon demand, and could not, so long as they remained in the business, refuse to do the business required of them, and that the Munn case simply decided that principle. The elevators were made public elevators, not by the constitution or laws of Illinois, but by the facts of that case.

The Slaughter-house cases (16 Wall., 36) decided that the act of the Louisiana Legislature, although granting an exclusive right or privilege as to the slaughtering of cattle and designating the
124 place for it, was yet valid as a police regulation as to such business and came under the description of a health regulation, and did not violate any provision of the Federal Constitution; but if the mere extent of the use of one's property by the public in the particular business in which he is engaged is to stamp that use as a public one, and if he is, therefore, to be held to have devoted his property to a public use, the power of the Legislature may be imposed upon a vast number of employments which have heretofore been regarded as wholly private, although at the same time very extensive.

A man may set up scales for weighing merchandise by the wholesale upon his own lands and announce his readiness to weigh the merchandise of all comers upon such terms as they may agree as to compensation. As soon as his business reaches proportions large enough to enable the Legislature, in its discretion, to declare that he has devoted his property to a public use, that moment it is clothed with the power to limit him in his compensation for the use of his own property. It is in vain for him to say that he has asked and received nothing from the State by way of any special privilege or right, and that he has a right to charge what he will for the use of his own property, and the public has no right to demand his services. The answer would be you have devoted your property to a public use because great numbers of the public desire to and do use your property for the purpose that you have offered it, and it is entirely immaterial that the public has no legal right to demand such use. As long as you are in the business you must submit to be regulated by the power of the State.

If a man should erect on his own land a large steam-mill to grind

corn, and, by reason of his superior facilities, large numbers of persons should resort to it for the purpose of having their corn ground, has he devoted his property to a public use because of the extent to which the public make use of his property for the purpose for which he erected or fitted it up? So long as no person has the right to make use of such property against the will of the owner, and so long as he neither exercises nor receives any special privilege from
125 the State, can it be plausibly maintained in this State that it can impose upon him a limitation as to the amount which he is to receive for the use of his own property?

Nothing like this question was discussed or decided in Township, etc., *v.* Beasley (94 U. S., 310), as the only controversy there existing was whether the particular purpose for which the bonds were in that case issued was covered by the Kansas enabling statute. The validity of that statute was not discussed or decided. But there are some States where a riparian owner has been given the right to build dams for the purpose of running mills by water power, and to overflow thereby the lands of others, upon payment of the damage done, and it has been held that the overflowing of the land was for a public purpose—*i. e.*, for a mill, and that it might be done under the authority of the Legislature upon due compensation being made. Many of such statutes are set forth in the note to the very learned opinion of Mr. Justice Gray in Head *v.* Amoskeag, etc., Company (113 U. S., 9), in which case it was held by the Federal court that such a statute violated no clause of the Federal Constitution; but the act was upheld in that court, not as a proper exercise of the right of eminent domain, as taking property for a public use, and it was considered as one regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed.

This court has never gone to any such length, however, in determining what was a public use, within the taxing power or within that of eminent domain. In Hay *v.* Cohoes Company (3 Barb., 42, 47) it was stated that no exercise of any such assumed right (that of eminent domain) had ever been attempted by our Legislature in favor of mills of any kind, and it was said that sites for steam-engines, hotels, churches, and other public conveniences might as well be taken by its exercise.

In Weismer *v.* Village of Douglass (64 N. Y., 91), which was substantially a mill case, where the defendant was authorized to
126 issue its bonds to raise money to pay a subscription to a corporation which was expected to run a saw-mill on the Delaware river, this court held that the bonds were not issued for a public purpose and the property of individuals could not be taxed to raise money to pay the principal or interest on such bonds. The purpose was declared not to be a public purpose because (among other reasons) the public had no right to go to the mill of the corporation, when completed, and demand the right to have logs sawed into lumber there. As the corporation could refuse at any and at all times to saw the lumber for any particular person or for all persons, the business of building or running the mill was not a public pur-

pose or use, and, of course, property thus used was not devoted to a public use, and taxation for it was illegal. And *In re* Application of Eureka Basin, etc., Company of Long Island (96 N. Y., 42) the company was organized to (among other things) acquire certain swamp lands and erect thereon basins, docks, wharves and piers, and warehouses for storing goods from vessels, etc., and it desired to obtain certain lands by the exercise of the power of eminent domain, upon the assertion that the use contemplated was a public one. This court held that, as the public did not have the right to use the warehouses or to direct in any way their management and the property remained under private ownership, it was not a public use to which it was to be put, and hence no right existed to exercise the power asked for. The court said: "The fact that the use to which the property is intended to be put or the structure intended to be built thereon will tend incidentally to benefit the public by affording additional accommodations for business, commerce, or manufactures is not sufficient to bring the case within the operation of the right of eminent domain so long as they are to remain under private ownership and control and no right to their use or to direct their management is conferred upon the public."

These two cases in our own courts illustrate the matter of a public use when that term has been employed with reference to the two great powers of taxation and eminent domain, and they show
127 that in circumstances such as therein stated the fact that the public had no legal right to resort to the premises and to demand the use of the owner's property on payment of reasonable compensation was fatal to the claim that such use was of a public nature or that the property was in such case devoted to a public use. There is no distinction of principle between the cases, and whenever it has been claimed heretofore that property has been devoted to a public use the term has expressed the fact which existed—that the public had a right of resort to the premises and to use the property or to demand transportation, etc., upon reasonable compensation being paid or tendered. And the case of a steam-mill, which I have instanced, would not in this State be regarded as in the least degree a property which was devoted to any public use whatever, although its presence might greatly tend to benefit and accommodate the public.

The same principle has been decided in Vermont in Tyler *v.* Beacher (44 Vt., 648), and the opinion of Mr. Justice Wheeler is referred to as a very able examination of the subject of what is a public use. If the power were as broad as is sometimes claimed, so that every sovereignty might regulate the conduct of its citizens towards each other in this way when necessary for what the Legislature should determine to be the public good and could regulate the manner in which each person should use his property to the extent of making this limitation, then the whole power of legislation rests with the legislative department, unrestrained by any constitutional prohibition, and it is but necessary for the Legislature to decide that its proposed enactment is for the public good and general welfare, and such decision stands as a conclusive reason for and

justification of its action. This cannot be and is not true. There are limitations to this doctrine other than the mere will of the Legislature and its decision as to what constitutes the public good or the general welfare. These limitations are to be found in our fundamental law, and have been frequently discussed, and limitations have been placed upon the exercise of such power by the decisions of this court in carrying out the provisions of the Constitu-
128 tion. For example see Wynehamer *v.* People (13 N. Y., 378); *In re* Jacobs (98 *id.*, 98); People *v.* Marx (99 *id.*, 377); People *v.* Gillson (109 *id.*, 389).

The clause in our Constitution that no person shall be deprived of life, liberty, or property without due process of law (Const., art. 1, § 6), is to have a large and liberal interpretation, as this court has said in so many words and as is evidenced by the above-cited and other cases. The citizen is thereby protected against any unlawful invasion of such rights or of any essential incident to the enjoyment thereof. Many instances of the benefits of this provision are cited in those cases and in the dissenting opinion of Mr. Justice Field in the Munn case, which, it seems to me, is a most masterly examination and clear statement of the principles which I believe this State has always stood by and protected through its courts.

These cases hold that the liberty mentioned in the bill of rights is not the mere right to be free from personal restraint. It includes a right to labor and to receive the fruits of one's labor (which includes the price for the use of one's property) in all ways which are not harmful to the welfare, the health, the happiness of others. The whole reason for the existence of the police power rests in the theory that one shall so use his own property as not to interfere with the proper use by others of their property and so as not to interfere with the public health, morals, or general welfare. The last words do not give power to the Legislature, arbitrarily, to determine the question what is for the general welfare, but such power is subject to the constitutional restrictions already adverted to, beyond or in violation of which the Legislature cannot go.

The case of Vanderbilt *v.* Adams (7 Cow., 349) was decided by our Supreme Court in the early part of the century. The facts show a clear case for the exercise of the authority claimed under the act of the Legislature providing for the regulation of the harbor of New York. The plaintiff was the owner of a private wharf; such an one, I assume, as is spoken of in the cases of Langdon *v.* The Mayor (93 N. Y., 129) and Williams *v.* The Mayor (105 *id.*, 419), as
129 I know of no other kind of private wharf in New York. It was held that the wharf was subject to the harbor regulations contained in the legislative act, because such regulations were merely an exercise of the police power necessary to prevent confusion and to promote the peace and good order necessary to be observed in a crowded harbor, such as New York was even then regarded. It was held that the city had never by its grant of the land under water or of the right to build a wharf parted with the right which it had received under its charter over the subject-matter of the wharves and their regulation.

The difference of title of shore owners on the New York and Brooklyn sides of the East river is discussed in Wetmore *v.* Atlantic White Lead Company (37 Barb., 70) and referred to and recognized in the case of same plaintiff against Brooklyn Gas Company (42 N. Y., 393), and it was distinctly stated in last-cited case that the State did not by its former acts grant any right or privilege or franchise to the owners of the land under water upon which could be based the right to compel the owner of the land to consent to its uses by the public.

The license cases (5 How., 504, at 583) decided only that regulations for the sale of intoxicating liquors were valid and did not infringe any provision of the Federal Constitution. Taney, Ch. J., in speaking of the police power of the State simply said that it was of the same class as any other power—inherent in every sovereignty. There was no pretense of a claim that it was a sovereign power uncontrolled and unlimited by the clauses of the Constitution providing for the liberty of the citizen. When the State legislates it does so by virtue of the power of sovereignty, which is, as the learned chief justice said, the power to govern men and things within the limits of its dominion.

It has been frequently said that the police power rests for its foundation upon the general duty of each citizen to so use his property as not to interfere with the fair and proper use by his neighbor of his property and to protect and guard the public health and
130 morals. The power to regulate or limit the price for the use of property situated like that in this case comes within no fair definition of such power, nor does it belong to the category of things that should be regulated in order that another may properly enjoy his own property or that the public health or morals may be protected.

An examination of the cases now before us, in view of these observations, will show, as I think, that these defendants have never devoted their property to a public use, so that the public had a right to require their service, and that they have received no immunity or privilege from the State upon which this claimed right of limitation can be imposed as a condition to its exercise.

These defendants are the owners or lessees of certain elevators or warehouses used in the harbor of New York for the purpose of transferring grain from one vessel to another, from canal boat to steamship, or from boat to rail car, or for the storing of grain. They are not a corporation, nor have they received any special privilege from the State in regard to their business, nor are they engaged in a business which is not absolutely free to any one who wishes to use his property in the same way. They have no special right to use the waters within the jurisdiction of the State in a manner not equally open to every citizen, not only of the State, but of the United States. The State furnishes them no special facilities for the carrying on of their business, and they are under no obligations to it for any protection to their business or property other than such as is given by and is due from the State to all the inhabitants thereof, viz., the duty of protection to their persons and property while they are law-

fully engaged in their occupations. They are under no legal duty to engage in such occupation for all who may come and ask them. They have the perfect right to refuse to elevate by means of their elevators a bushel of grain for A, and at the same time they have the right to use such elevators to elevate the grain of B. They have the equal right to refuse to store the grain of any or of all persons.

I fail entirely to see how such a business can be said to be
131 one in which the public have an interest in the way of a right to limit through legislation the price for which such business shall be done.

The defendants are situated entirely different from the elevator owners in Chicago, whose rights were adjudicated upon in the Munn case. The canal boats loaded with grain, after their passage down the Hudson river, seek the owners of the storehouse in which to store the same until wanted, or the floating elevator is sought for and found and employed to unload the cargo of the boat into the hold of the steamship. There are large numbers of warehouses and elevators which are in no way connected with each other. In neither case is there anything like what can be called a monopoly, virtual or otherwise. The utmost stretch of the imagination cannot so regard it. The warehouses are private property, and no one can enter upon them without the consent of their owners. (Wetmore *v.* Atlantic White Lead Co., 37 Barb., 70; Wetmore *v.* Brooklyn Gas Light Co., 42 N. Y., 384.)

Still more plainly is this the case with a floating elevator. It is not a common carrier or wharfinger or warehouseman. It has no monopoly, virtual or otherwise, as to facilities of place, convenience of situation, or license or privilege from the State. In the nature of the business of both the warehouseman and the elevator owner it is wholly private. Now, in what is the case made less strong when, instead of the scales or the mill heretofore instanced, an elevator or warehouse is substituted? It is built by individuals or private partnerships and occupied by them or leased to other private individuals or partnerships. It is built on lands owned by individuals, or it is in the substantial form of a boat and floats on the public waters of the State, and its owners have received no kind of license, privilege, or immunity from the State in any way special in its nature or which is not common to all the people of the State. How, then, has the owner devoted it to a public use? It is claimed that he has done so because the elevator or warehouse is to be used to elevate or store a vast amount of grain which comes from the West seeking transportation through the Erie canal, and because it
132 costs a large amount of money to build such structures, and owing to the facility and cheapness with which the elevator does the work, as compared with the labor of individuals, those who own the grain or those who are interested in its transportation are compelled to use such elevator, if they desire to successfully compete in the business of transportation and in the loading or unloading of such grain. Hence, it is said, a virtual monopoly exists, and the persons who own it are under the regulating power of the Legislature as to their compensation. But I deny that there is any virtual

monopoly. There was such in the case in 12 East (*supra*), because there was no right in any other owners of warehouses to receive the wines on storage, and the right existed in the dock owners by virtue of a special grant from the sovereign. A monopoly in a business where the persons engaged in it have no exclusive privilege and into which business the whole world is at liberty to enter, and upon entering which they will be possessed of precisely the same rights and privileges as the others engaged in it, is a contradiction in terms. Loosely speaking, a person or corporation is said to have a virtual monopoly of a business when, on account of its great extent and the facilities it has for transacting it, arising from its large proportions, the article it manufactures or sells substantially takes possession of the market. Such, for instance, is the case in the manufacture and sale of matches. One company does an enormous business and has almost what is called a monopoly in some parts of the country, arising not from any special privilege or right granted to or exercised by it, but because of its facilities, and it is therefore enabled to make the article cheaper and sell it cheaper than its competitors. But would any one suggest that the State has, therefore, a right to limit the price which the company shall charge for matches? If it be a corporation, indeed, or if it has received any special privilege or right from the State, then conditions may be imposed upon it, although none can be simply because of the greatness of its sales or the number of the public interested in procuring cheap matches.

133 But when the right of regulation as to compensation is spoken of because the person has a virtual monopoly the term has heretofore been used as indicative of some special privilege or franchise granted to the individual by the sovereign which results in such virtual monopoly, and the right of such regulation exists by reason of such grant. No monopoly of that kind exists in this case. If it be said that the effect is the same, the answer is that it is not the same. In the one case the monopoly exists by reason of the action of the Government, and no other citizen can come in and devote his capital and energy to such use. In the other the monopoly exists only as long as other citizens choose to keep out of the business, and just as soon as it is seen that the least degree over the ordinary profit can be realized by an investment in elevator property just that moment capital will flow into that channel and probably away from some industry where the average rate of profit has ceased to be made. Thus in one case the result cannot be avoided or in any way altered excepting by the action of the sovereign, while in the other case it may be altered by the action of the ordinary laws of trade. The effect, while it lasts, may possibly be the same in both cases, but in the one it is arbitrary and dependent upon the Government and in the other subject to alteration according to general commercial rules. But in this case there is no pretense of a monopoly grounded upon lack of ability in the public to compete. On the contrary, the complaint is that the competition has been so fierce and the numbers of those engaged in the business so great that they have combined to fix upon prices below which

they would not work, and it is in reality the combination of which complaint is made. If the prices for doing the work are higher than is reasonable, owing to such combination, the combination itself may be illegal (see Hooker *v.* Vandewater, 4 Denio, 349; Stanton *v.* Allen, 5 *id.*, 435), and, as has been said, the persons engaged in it may render themselves amenable to the criminal laws of the State, but no power of the State to limit the price for which
134 a person may sell his property or the use of it results from a violation of the law against conspiracies or combinations to raise illegally the prices of articles or the charges for services which have a commercial value.

It is said, however, that the defendants have received some privileges or benefits from the State in their business of elevating or storing grain, because the State has built the Erie canal and spent large sums of money for that purpose, and the business of elevating grain into and out of a canal boat or of storing it is made much greater than would be possible but for the constant maintenance of the canal by the State, and if the State should cease to maintain the canal the business of transporting grain over it would be wholly destroyed, and therefore it must be conceded that the business of elevating grain receives support from the public, and it is only through such support that the business can exist. It is difficult, as it seems to me, to regard this argument seriously. The State, it is thus said, has built a canal, and there are men (not the defendants) who propose to avail themselves of its existence and to transport merchandise in their boats over its waters. Before undertaking such transportation, however, they must load their boats or unload them after such transportation is finished, and in the process of loading or unloading their boats in the public waters of the State they hire the defendants to do the elevating of the cargo. If the canal had not been built there would have been no boatmen with canal boats asking for cargoes, and consequently the defendants would not have had the opportunity of loading their vessels. Therefore the State has conferred a privilege upon the defendants by using which they acquiesce in the right of the State to limit the amount of compensation they can lawfully demand for the use of their own property. The mere statement of the proposition, it seems to me, is its best refutation. To argue upon it would seem to admit that it is debatable. By reason of the action of the State in building the canal more frequent opportunities have arisen from which the defendants have been enabled to engage in a certain kind of labor and to invest their capital in certain kinds of
135 property, but not a privilege, immunity, or franchise of any description has the State granted to them, even by the loosest construction of language.

The legislation in question is nothing else than an effort, not only to regulate the private business of private individuals, but to limit the amount for which they shall exact compensation for the use of their own property, in which the public has no interest whatever, in the legal meaning of that term. If it is legal in this case it is legal in any. The Legislature can step in and limit the prices of

every article of commerce—the product of the field, the mine, or the manufactory. There is seemingly no length to which it may not go, and no home to which this power may not be applied in matters of the most individual and private nature, and all under the guise of legislation for the public good and the general welfare.

It is true that the question of the validity of this law is one of power and not of propriety, and if the Legislature, in any case, may have, under any circumstances, the power to limit the compensation which a private individual may receive for the use of his own property, not devoted to a public use and in regard to which he receives and exercises no special privilege or immunity from the State, then we are bound to suppose such circumstances to exist in the case before the court. We are of the opinion that the Legislature has no such power.

There is no foundation for the argument that the elevator owners have a monopoly because they have their charges fixed by the produce exchange, which only recognizes as regular the warehouse receipts given by elevator owners or warehousemen who are members of that body. If that be the fact, it constitutes in no view of the subject a monopoly. What has already been said upon the subject applies in equal degree to such an argument; nor have the defendants thereby received any privilege or franchise from the State.

The disposition of legislatures to interfere in the ordinary concerns of the individual, as evidenced by the laws enacted by Parliaments and legislatures from the earliest times, and the
136 futility of such interference to accomplish the purposes intended, have been the subject of remark by some of the ablest of English-speaking observers. Buckle, in his History of Civilization in England, in speaking of the course of English legislation, says: "Every great reform which has been effected has consisted, not in doing something new, but in undoing something old. The most valuable additions made to legislation have been enactments destructive of preceding legislation, and the best laws which have been passed have been those by which some former laws have been repealed." And again: "We find laws to regulate wages; laws to regulate prices; laws to regulate profits; laws to regulate the interest of money; custom-house arrangements of the most vexatious kind, aided by a complicated scheme, which was well called the sliding scale—a scheme of such perverse ingenuity that the duties constantly varied on the same article, and no man could calculate beforehand what he would have to pay. A system was organized and strictly enforced of interference with markets, interference with manufacturers, interference with machinery, interference even with shops. In other words, the industrious classes were robbed in order that industry might thrive." (Buckle's History of Civilization in England, vol. 1, pp. 199, 200, etc.)

The legislation under review is of the same general nature. To uphold legislation of this character is to provide the most frequent opportunity for arraying class against class; and, in addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the posses-

sion of the Government, so that legislative aid may be given to the class in possession thereof in its contests with rival classes or interests in all sections and corners of the industrial world. We shall have a recurrence of legislation which it has been supposed had been outgrown, not only as illegal, but as wholly useless for any good effect, and only powerful for evil. Contests of such a nature are productive only of harm. The only safety for all is to uphold in their full vigor the healthful restrictions of our Constitution, which provide for the liberty of the citizen, and erect a
137 safeguard against legislative encroachments thereon, whether exerted to-day in favor of what is termed the laboring interests or to-morrow in favor of the capitalists. Both classes are under its protection, and neither can interfere with the liberty of the citizen without a violation of the fundamental law.

In my opinion the court should not strain after holding such species of legislation constitutional. It is so plain an effort to interfere with what seems to me the most sacred rights of property and the individual liberty of contract that no special intendment in its favor should be indulged in. It will not, as seems to me plain, even achieve the purposes of its authors. I believe it vain to suppose that it can be other than of the most ephemeral nature at its best, or that it will have any real virtue in altering the general laws of trade, while, on the other hand, it may ruin or very greatly impair the value of the property of wholly innocent persons. If the compensation limited by the act is not sufficient to permit the average rate of profit upon the capital invested it will result either in its evasion or else the work will not be done, and the capital employed will seek other channels where such average rate can be realized or the property will become of little or no value. If the compensation be sufficient the same result aimed at would soon follow from the general laws of trade, from the law of supply and demand, and the general cost of labor and materials.

Every one having the same right to build an elevator or warehouse that these defendants have, and upon its completion to employ it in the same business, if the rate of profit is above the average, capital, if allowed absolute freedom and legal protection, will flow into the business until there is enough invested to do all or more than all the work offered, and then, by the competition of capital, the rate of compensation would come down to the average. Such, at least, would be the tendency, and it could only be averted by combination among the owners of the property, which could not be long sustained in the face of perfect freedom to all to invest in such undertakings. That they are expensive and require the
138 outlay of a large amount of money to build and maintain them, and that the warehouses now existing may have an advantage in location, does not, as has been shown, make them a monopoly, but simply tends to make the inevitable result a trifle more slow in its approach than in other cases requiring a smaller outlay. If it be said that there is already a superabundance of elevators, more than can be or are used, and that some of them lie idle while others do the work, and they all share in the profit; if the